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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos* v. *United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

PARTIES TO THE PROCEEDINGS

The United States of America is the petitioner in this Court. The United States brought this prosecution in the district court and was the appellee and cross-appellant in the court of appeals.

The following parties are respondents in this Court: McWane, Inc.; James Delk; and Michael Devine. All respondents were defendants in the district court. Respondent McWane, Inc., was an appellant in the court of appeals. Respondents Delk and Devine were appellants and cross-appellees. Charles Barry Robison was a defendant in the district court and initially filed a notice of appeal in the court of appeals but subsequently dismissed his appeal and thus was not a party at the time of the court of appeals' decision. App., *infra*, 9a n.5. Thus, Robison would not appear to be a respondent in this Court pursuant to Supreme Court Rule 12.6 and would not appear to have an interest in the outcome of the petition.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on March 27, 2008 (App., *infra*, 42a-59a). On June 14, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 25, 2008. On July 18, 2008, Justice Thomas further ex-

tended the time to August 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to this petition: 33 U.S.C. 1311(a), 1319(c)(2)(A), 1362(7), and 1362(12); 33 C.F.R. 328.3(a); and 40 C.F.R. 230.3(s). App., *infra*, 60a-64a.

STATEMENT

Respondents, a manufacturing firm and two high-level executives, were convicted under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), of conspiring to knowingly discharge pollutants into the waters of the United States and of a variety of substantive violations of the Act. In light of this Court's intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the court of appeals vacated the convictions. While recognizing that its decision conflicted with the First Circuit's resolution of the same question, the court concluded that the phrase "waters of the United States" in the CWA bears the meaning identified in Justice Kennedy's opinion concurring in the judgment in *Rapanos*. The court further held that the jury instructions in this case did not embody Justice Kennedy's standard, and that the instructional error was not harmless.

Although the court of appeals acknowledged that the convictions might well have been affirmed under the interpretation of the phrase "waters of the United States" set forth by the four-Justice plurality in

Rapanos, and that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case," App., *infra*, 29a, the court declined to decide that issue, *id.* at 29a-30a & n.20. Instead, the court found Justice Kennedy's opinion controlling, even though the four dissenting Justices in *Rapanos* made clear that they would find coverage under the CWA based on either the plurality's or Justice Kennedy's standard. *Id.* at 10a-25a. The court of appeals denied rehearing en banc over a written dissent. *Id.* at 42a-59a. That dissent noted that the panel's decision conflicts with this Court's decisions interpreting precedents with fragmented majorities, *id.* at 54a-55a; "gives no legal effect to a standard under which eight Justices would find CWA jurisdiction," *id.* at 43a; directly conflicts with the First Circuit's interpretation of *Rapanos*, *id.* at 59a; and concerns a matter of "exceptional importance," *id.* at 43a.

1. Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). Section 309(c)(2)(A) makes it a felony to commit a knowing violation of the CWA's discharge restrictions. 33 U.S.C. 1319(c)(2)(A). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) share responsibility for implementing and enforcing the CWA. The EPA and the Corps have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 40 C.F.R.

230.3(s) (EPA definition); 33 C.F.R. 328.3(a) (Corps definition). Those definitions encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 40 C.F.R. 230.3(s)(1), 33 C.F.R. 328.3(a)(1); "[t]ributaries" of traditional navigable waters, see 40 C.F.R. 230.3(s)(5), 33 C.F.R. 328.3(a)(5); and wetlands "adjacent" to other covered waters, see 40 C.F.R. 230.3(s)(7), 33 C.F.R. 328.3(a)(7).[1]

The CWA establishes two complementary permitting schemes. Section 402 authorizes the EPA, or a State with an approved program, to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342. Section 404 authorizes the Corps, or a State with an approved program, to issue a permit for the discharge of dredged or fill material. 33 U.S.C. 1344.

2. This Court has recognized that Congress, in enacting the CWA, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987). In *Solid Waste Agency of*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 40 C.F.R. 230.3(s), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 40 C.F.R. 230.3(s)(1), this brief will refer to the latter as "traditional navigable waters."

Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See 547 U.S. at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *ibid.*[2] Justice Kennedy interpreted

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

3. Respondents were convicted of discharging massive amounts of untreated industrial wastewater from a manufacturing plant into a stream that flowed yearround into other permanent streams that fed into traditional navigable waters.

a. Respondent McWane, Inc., is a large manufacturer of cast iron pipe, and respondents Delk and Devine are two high-level managers at McWane's Birmingham foundry. App., *infra*, 2a-3a. Over a period of years, respondents routinely discharged large quantities of untreated contaminant-laden wastewater from the foundry into a tributary of traditional navigable waters, in violation of the plant's CWA permit. *Id.* at 4a-6a. The operation of McWane's pipe-manufacturing machinery "utilizes a great deal of water," *id.* at 4a, and under each pipe-casting area was a basement to catch water that leaked out of the machines, *id.* at 5a. The water accumulating in the basements contained numerous contaminants, including hydraulic oil, excess iron, and trash. *Ibid.* When water levels in the basements rose too high, as they did on a weekly basis, that industrial wastewater had to be pumped elsewhere in order for the casting

machines to continue to manufacture pipe. *Id.* at 6a; Tr. 3037-3038.

McWane's NPDES permit for the Birmingham plant authorized the discharge of specified amounts of treated industrial wastewater into Avondale Creek from one discharge point (DSN001). App., *infra*, 5a. The permit also authorized the discharge of stormwater runoff from other discharge points at the plant (DSN002-DSN020). *Ibid.* The permit did not authorize the discharge of industrial wastewater from any point other than DSN001. *Ibid.*

By the late 1990s, McWane's Birmingham plant was in "disarray." App., *infra*, 5a-6a. Industrial wastewater regularly overflowed and "would then spill into the storm water runoff discharge points (DSN002-DSN020)," where it was not authorized for discharge under the permits, and would "flow into Avondale Creek." *Id.* at 6a. "One McWane employee described the extent of the * * * discharges as '[e]nough to drown a small village.'" *Ibid.*

The evidence also established the defendants' culpable knowledge and participation in a conspiracy. Defendants used diesel pumps and hoses, sometimes at night and during rainstorms to avoid detection, to pump wastewater directly into the stormwater drains, which emptied into Avondale Creek. Tr. 526, 1058, 1159, 1214-1215, 1361, 2890-2891. Respondent Delk "ordered McWane employees to pump process wastewater from the basements, despite knowing that the wastewater had nowhere to go but Avondale Creek," and he directed an employee to falsify a water sample. App., *infra*, 6a. Respondent Devine had actual knowledge of the terms of McWane's NPDES permit that he caused to be violated, but he stated that it would be "easier" for

McWane to pay fines than to fix the cause of its wastewater problems, and he directed a subordinate to lie to a state investigator about the cause of the discharges. *Id.* at 6a-7a, 34a.

The vast majority of the unpermitted discharges from the plant came from DSN002, a stormwater outfall pipe that empties directly into Avondale Creek approximately 1000 feet upstream from the creek's confluence with Village Creek.[3] Significant quantities of McWane's discharges were observed flowing into Village Creek, Tr. 147-148, 170-171, 189, 232, sometimes miles downstream, Tr. 1816-1818, 1860-1861, 2130-2132. The evidence showed Avondale Creek running white with pollution from bank to bank (GX76); revealed oil residue approximately six feet up Avondale Creek's bank at DSN002 (Tr. 254; GX15, GX24); and documented red pollutant plumes streaming into the creek (Tr. 251-252; GX24, GX25, GX27). Testimony and photographs from site visits during many different months over a two-year period showed a milky pollutant plume from Stormwater Outfall DSN002's point of discharge into Avondale Creek (GX35, GX37, GX53, GX63) and on into Village Creek (GX12, GX13, GX41, Tr. 258-260).

b. Avondale Creek flows into Village Creek. App., *infra*, 3a. From its confluence with Avondale Creek, Village Creek flows approximately 28 miles into and through Bayview Lake, which was created by damming Village Creek, where it joins the Locust Fork. *Ibid.* At a point 26.7 miles downstream from its confluence with

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[3] The parties agreed that Stormwater Outfall DSN002 was approximately 1000 feet upstream of the confluence of Avondale Creek with Village Creek. Compare Tr. 4479-4480, 4551, with CR 04-PT-199-S Docket Entry No. 87 (N.D. Ala. Sept. 23, 2004) (Defs.' J. Mot. at 10), DX90, DX1036.

Avondale Creek, Village Creek is a designated "Section 10 water" and thus a traditional navigable water for purposes of the CWA. GX177.[4] Further downstream, Village Creek flows into two other designated Section 10 waters (the Locust Fork and Black Warrior Rivers) and ultimately into the Gulf of Mexico. App., *infra*, 4a; GX177.

An EPA expert testified at respondents' trial that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek. App., *infra*, 3a. The expert further testified "that there is 'a continuous uninterrupted flow' not only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River." *Id.* at 3a-4a; see *id.* at 16a; Tr. 2574-2575 (Avondale Creek is full of fish); Tr. 187 (stormwater management inspector testifying that Village Creek continues on after Bayview Lake); GX236 (United States Geological Survey map); GX240 (watershed map); Tr. 2230-2231 (EPA expert testifies about flow of Village Creek into and out of Bayview Lake); Tr. 183-186, 2236, 2247. Abundant additional uncontroverted evidence, including respondents' testimony and exhibits, established the perennial nature of, and sizable

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[4] "Section 10 waters" are "navigable water[s] of the United States" subject to federal regulatory jurisdiction under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 and 403, and are among the traditional navigable waters covered by the CWA. See p. 4 & note 1, *supra*. Pursuant to its authority under 33 U.S.C. 401 and 403, and 33 C.F.R. Part 329, the Corps maintains a list of waters that it has determined qualify as "navigable waters of the United States."

flows in, Avondale and Village Creeks. See Tr. 236, 1114, 2027-2028, 4552-4554.[5]

c. In accordance with then-current Eleventh Circuit precedent, the jury at respondents' trial was instructed as follows:

> [A] "water of the United States" includes any stream which may eventually flow into a navigable stream or river. * * * The stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a navigable stream or river whose use affects interstate commerce.
>
> A navigable stream or river is defined as one that is used or is susceptible of being used in its ordinary

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[5] The court of appeals suggested that respondents "had no incentive to present evidence regarding a lack of continuous flow." App., *infra*, 30a n.20. But in fact respondents, in an attempt to demonstrate that the extensive discharges of pollutant-laden waters could not have occurred, affirmatively sought to establish that Avondale Creek provides year-round habitat for numerous species of fish and aquatic invertebrates. See, *e.g.*, DX914-DX938; DX952-DX972, Tr. 4357, 4377-4380, 4408-4409. Respondents' expert testified that Avondale Creek supports a resident population of fish that do not move out of the area and that remain year-round in the segment of Avondale Creek next to McWane's Birmingham plant. See Tr. 4431-4435, 4476-4477; see also Tr. 75-76 (opening statement discussing abundance of fish at the McWane outfall); Tr. 4816 (same during closing argument). The court of appeals also noted that the EPA expert did not conduct "tracer tests" to confirm that water in the Avondale Creek flowed to the Black Warrior River, and that the expert was able to walk the length of Avondale Creek because of its low water level. App., *infra*, 30a n.20. Neither of those observations undercuts the overwhelming proof that Avondale Creek is a perennial stream connected to traditional navigable waters through other perennial tributaries.

> condition, as a highway for interstate commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

App., *infra*, 11a-12a (emphasis omitted).

d. After a six-week jury trial, respondents were convicted of, *inter alia*, multiple substantive CWA violations and one count of conspiracy to violate the CWA. App., *infra*, 8a-9a. McWane was sentenced to 60 months of probation and a $5,000,000 fine. *Id.* at 10a. Delk was sentenced to 36 months of probation and a $90,000 fine. *Id.* at 9a. Devine was sentenced to 24 months of probation and a $35,000 fine. *Id.* at 9a-10a.

4. Based on this Court's intervening decision in *Rapanos*, the court of appeals reversed respondents' CWA convictions and remanded for a new trial on those counts. App., *infra*, 1a-41a.

a. Because no opinion commanded a majority in *Rapanos*, the court of appeals turned to *Marks* v. *United States*, 430 U.S. 188 (1977), in which this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted). The court of appeals in this case construed that language in *Marks* to mean that, in identifying the controlling rule of law that emerged from *Rapanos*, a lower court must ignore the views of those Justices who dissented from the *Rapanos* Court's disposition of the case. See App., *infra*, 23a-24a. As between the plurality's standard and that of Justice Kennedy, the court deemed Justice Kennedy's "significant nexus" standard to be the "narrowest" grounds for the decision in *Rapanos* because "Jus-

tice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as 'navigable' more frequently than Justice Scalia's test." *Id.* at 25a.

The court of appeals therefore "adopt[ed] Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under *Rapanos*." App., *infra*, 25a. The court recognized that the First Circuit has "determined that it would uphold CWA jurisdiction in those cases in which *either* Justice Scalia's test or Justice Kennedy's test was satisfied." *Id.* at 22a (citing *United States* v. *Johnson*, 467 F.3d 56, 64-65 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007)). The court believed, however, that the First Circuit's approach was inconsistent with *Marks* because the First Circuit had taken into account the views of the *Rapanos* dissenters in identifying the rule of law that *Rapanos* established. See *id.* at 22a-23a, 29a-30a.

b. The court of appeals held that the jury instruction given at respondents' trial was not consistent with Justice Kennedy's "significant nexus" standard. The court explained that the jury instruction that defined the term "water of the United States" did not use the term "significant nexus" and did not "advise the jury to consider the chemical, physical, or biological effect of [the nonnavigable tributary] on the [traditional navigable water]." App., *infra*, 26a. The court further held that the instructional error was not harmless because the government had presented no evidence that would demonstrate a "significant nexus" between the tributary into which pollutants were discharged and the traditional navigable water into which the tributary flows. See *id.* at 26a-28a.

The court of appeals noted that "the district court's jury instruction was still erroneous even under Justice

Scalia's plurality opinion, because the instruction allowed the jury to find that [respondents'] discharges were into a 'navigable water' even if the jury also concluded that Avondale Creek flowed 'only intermittently.'" App., *infra*, 29a. The court recognized, however, that, under the *Rapanos* plurality's standard, "that error may well have been harmless, because [an EPA expert had] clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." *Ibid.* The court therefore stated that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case." *Ibid.* The court did not resolve whether the convictions would have to be affirmed under the plurality's standard, however, because of its conclusion that only Justice Kennedy's opinion mattered. *Id.* at 30a n.20.

c. The court of appeals denied rehearing en banc, with two judges dissenting. App., *infra*, 42a-59a. The dissenting judges noted that the panel's decision conflicted with the First Circuit's ruling in *Johnson*. *Id.* at 59a. They further concluded that the panel's analysis "fails as a matter of common sense," since it precludes the CWA's application in circumstances—*i.e.*, where the *Rapanos* plurality's standard is shown to be satisfied but the plaintiff has not proved a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's opinion—where eight Members of this Court would hold that the Act applies. *Id.* at 43a; see *id.* at 57a (describing that outcome as "bizarre"). Those judges also explained that the panel's error was one of "exceptional importance" because "[t]he large number of water bodies and wetlands in the [Eleventh Circuit], coupled with the significant pace of development, sug-

gests that later disputes over the scope of federal authority under the Act may occur with some regularity." *Id.* at 58a.

REASONS FOR GRANTING THE PETITION

In *Rapanos* v. *United States*, 547 U.S. 715 (2006), this Court issued a highly fractured 4-1-4 decision on the meaning of the term "waters of the United States" in the CWA. As the Chief Justice explained, "no opinion [in *Rapanos*] commands a majority of the Court on precisely how to read Congress' limits on the reach of the [CWA]." *Id.* at 758 (Roberts, C.J., concurring). Since the issuance of that decision, the courts of appeals have struggled to identify the controlling rule of law that emerged from the multiple opinions. The Eleventh Circuit's decision in this case creates an acknowledged circuit conflict on this seminal issue. App., *infra*, 20a, 23a; see *id.* at 58a-59a. Moreover, the court of appeals' analysis misinterprets *Rapanos* and this Court's precedents governing how to interpret fractured decisions; creates "bizarre outcome[s]," *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); will seriously impede enforcement of the CWA; and presents an issue of exceptional importance both to the government and to the regulated community. That decision should not be permitted to stand.

Abundant evidence showed that the stream into which respondents discharged pollutants flowed year-round and that it fed, through perennial waters, into a traditional navigable river. That evidence proved that the site of the discharges was part of the "waters of the United States" under the standards endorsed by eight Members of this Court in *Rapanos*—the four-Justice plurality and the four dissenters. The Eleventh Circuit

nevertheless held that, even if respondents' discharges were covered by the CWA under the standards supported by eight Justices, respondents' convictions must be reversed. The court based that holding on the fact that the jury instructions failed to embody the "significant nexus" standard that Justice Kennedy articulated in his *Rapanos* concurrence, and on the court's conclusion that the instructional error was not harmless.

As the court of appeals itself recognized, the court's determination that CWA coverage may be established *only* under Justice Kennedy's standard squarely conflicts with the First Circuit's decision in *Johnson*, which held that coverage may be shown either under that standard or under the standard adopted by the *Rapanos* plurality. In allowing the interpretation of a single Justice to prevail over the contrary views of the other eight Members of this Court, the Eleventh Circuit's decision produced what the court in *Johnson* termed a "bizarre outcome." 467 F.3d at 64. Indeed, as the dissenters from the denial of rehearing en banc explained, "this case has been remanded for a new trial even though, as the panel acknowledges, the current record may well establish jurisdiction under the [*Rapanos*] plurality's test, which eight Justices agree encompasses waters covered by the Act." App., *infra*, 57a. That result warrants this Court's review.

The question presented concerns a matter of "exceptional importance." App., *infra*, 58a (Wilson, J., dissenting from the denial of rehearing en banc). Both in deciding whether to pursue enforcement actions and in providing regulated parties with guidance about the legality of proposed discharges, the Corps and EPA need clear and administrable rules defining the scope of the CWA's coverage. The circuit conflict produced by the Eleventh

Circuit's decision creates substantial uncertainty over the appropriate standard for deciding whether particular tributaries and adjacent wetlands are "waters of the United States." That confusion will inevitably hinder the agencies' ability to implement the Act in a uniform and workable fashion. Thousands of bodies of water and innumerable individuals and companies are affected by the extent of federal protection of perennially flowing waters that feed through tributary systems into traditional navigable waters. Indeed, "in view of the geography of the [pertinent] states," the potential impact of this decision in the Eleventh Circuit alone is enormous. *Ibid.* Review by this Court is necessary to resolve the circuit conflict, clarify the applicable law, and ensure that waters covered by the CWA under the views of eight Justices do not lose the Act's protections because of a misinterpretation of *Rapanos*.[6]

A. The Court Of Appeals' Decision Creates An Acknowledged Circuit Conflict Over The Meaning Of *Rapanos*

As the court of appeals acknowledged, its holding that CWA coverage may be established only under the *Rapanos* plurality's standard directly conflicts with the First Circuit's decision in *Johnson*. See App., *infra*, 20a-23a, 29a-30a. In this case, the resolution of that question is likely to be "outcome-determinative" in deciding whether respondents' convictions are upheld. *Id.* at 29a.

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[6] Of course, if this Court grants certiorari, it is possible that five Justices may agree on what standard is appropriate for determining what streams are "waters of the United States" under the CWA. At a minimum, however, the Court should resolve the circuit conflict over the rule of law that emerges from *Rapanos*.

As the court of appeals recognized, an EPA expert testified "clearly and unambiguously" at respondents' trial that the tributary into which respondents discharged pollutants flowed year-round and that it fed into traditional navigable waters. App., *infra*, 29a. That testimony, as well as abundant other record evidence (see pp. 8-10, *supra*), overwhelmingly established CWA coverage of the discharges under the standards endorsed by the four-Justice *Rapanos* plurality, see 547 U.S. at 739, 742, and by the four dissenting Justices, see *id.* at 810 (Stevens, J., dissenting). The court of appeals did not decide that issue, however, because it held that the *Rapanos* plurality's standard is legally irrelevant and that Justice Kennedy's "significant nexus" standard is the controlling rule of law that lower courts must use in applying the CWA to tributaries of traditional navigable waters. App., *infra*, 29a-30a & n.20.

In *Johnson*, by contrast, the First Circuit "conclude[d] that the United States may assert jurisdiction over [particular] sites if it meets either Justice Kennedy's legal standard or that of the [*Rapanos*] plurality." 467 F.3d at 60. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is shown to be satisfied, that approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at 64. The court also observed that, in a case where the plaintiff has established CWA coverage under the *Rapanos* plurality's standard but has not proved a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's concurrence, treating Justice Kennedy's standard as controlling would produce "a bizarre outcome—the court would find no federal juris-

diction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." *Ibid.* Thus, with respect to waters that have been shown to satisfy the plurality's standard for CWA coverage but have not been shown to satisfy that of Justice Kennedy, the First Circuit has unequivocally held that the CWA applies, and the Eleventh Circuit has unequivocally held that it does not.

The question that has divided the circuits is a recurring one that has spawned litigation across the nation. Two other circuits have discussed, without definitively resolving, the question whether the CWA applies to waters that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007), the court remanded for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." 464 F.3d at 725. The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case.

Similarly in *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008), the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling

rule of law *for our case*." 496 F.3d at 999-1000 (emphases added). The Ninth Circuit thus refrained from stating a categorical rule concerning the import of the fractured decision in *Rapanos*, and it did not specifically discuss the proper resolution of a coverage dispute involving waters that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy.[7] But its decision illustrates the difficulty that courts have encountered in identifying the legal principles established by *Rapanos*.

B. Waters That Satisfy The Standards Of Eight Members Of The Court In *Rapanos* Are Covered Under A Proper Interpretation Of The CWA

The Eleventh Circuit erred in concluding that Justice Kennedy's "significant nexus" standard for determining CWA coverage provided the exclusive legal rule of decision in *Rapanos*. In holding that the government had failed to establish CWA coverage of the waters into which respondents discharged massive amounts of pollutants, the Eleventh Circuit did not question the government's contention that the waters were encompassed by the applicable regulatory definition. Under the regulations promulgated by the EPA and the Corps, which define the term "waters of the United States" to include "[t]ributaries" of traditional navigable waters, see 40 C.F.R. 230.3(s)(5), 33 C.F.R. 328.3(a)(5), the stream into which respondents discharged pollutants was unambiguously covered by the CWA. Rather, the court of appeals construed this Court's decision in *Marks* v. *United*

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[7] Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See 496 F.3d at 1000-1001.

States, 430 U.S. 188 (1977), to require that Justice Kennedy's "significant nexus" standard be treated as "the governing definition of 'navigable waters' under *Rapanos*." App., *infra*, 25a; see *id.* at 19a-25a. That conclusion is incorrect and at odds with this Court's own precedents.

1. In *Marks*, this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." 430 U.S. at 193 (internal quotation marks omitted). In some (if not most) fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment will be the only controlling principle on which a majority of the Court's Members agree. That was true in *Marks* itself, see *id.* at 193-194, where this Court discussed its prior fractured decision in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). In *Memoirs*, a three-Justice plurality concluded that the First Amendment precludes the States from banning sexually explicit books "unless [a book] is found to be *utterly* without redeeming social value." *Id.* at 419 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.). Justices Black and Douglas, who concurred in the judgment (see *id.* at 421, 424), would have held "that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193.

The Court in *Marks* stated that the rule of law adopted by the *Memoirs* plurality, rather than the "broader grounds" (*Marks*, 430 U.S. at 193) urged by Justices Black and Douglas, "constituted the holding of

the [*Memoirs*] Court and provided the governing standards." *Id.* at 194. Treatment of the *Memoirs* plurality's rationale as the controlling legal rule served to effectuate the will of a majority of this Court. As the District of Columbia Circuit has explained, "[b]ecause Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' 'narrowest grounds' approach yielded a logical result." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992).

The approach described in *Marks* will reliably effectuate the views of a majority of the Court, however, only when one ground of decision offered in a fractured ruling is "narrower" in the sense of being "a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63 (quoting *King*, 950 F.2d at 781). If Justice Kennedy's "significant nexus" standard were "narrower" than the plurality's standard in that sense—*i.e.*, if, in every case where Justice Kennedy's standard would preclude CWA coverage, the plurality's approach would lead to the same outcome (but the plurality's approach would also preclude jurisdiction in some cases where Justice Kennedy's would not)—Justice Kennedy's standard would appropriately be treated as the controlling rule of law that would command a majority of the Court where it applied. As the First Circuit recognized in *Johnson*, however, "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the [*Rapanos*] plurality would limit jurisdiction" because Justice Kennedy's standard will exclude at least some waters that the plurality would find to be covered. 467 F.3d at 64. The court explained that "a small sur-

face water connection to a stream or brook" would satisfy the plurality's standard for CWA coverage but might not constitute a "significant nexus" to traditional navigable waters under Justice Kennedy's standard. *Ibid.* The Seventh Circuit has likewise noted that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1." *Gerke*, 464 F.3d at 725.

Indeed, the Eleventh Circuit's resolution of this case was premised on the court's understanding that some forms of proof may satisfy the *Rapanos* plurality's standard for CWA coverage but not that of Justice Kennedy. The court observed that, in its view, the government did not establish a "significant nexus," but that the proof may well have demonstrated a year-round flow between Avondale Creek and traditional navigable waters. See App., *infra*, 27a (explaining that, "[a]lthough [a government witness] testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any 'significant nexus' between Avondale Creek and the Black Warrior River"); *id.* at 29a (noting that "[t]his case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test"). And while the Eleventh Circuit reversed respondents' convictions under Justice Kennedy's "significant nexus" standard, the court recognized that affirmance of the convictions might be appropriate under the *Rapanos* plurality's standard. See *ibid.* (stating that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case"). By contrast, if the court of appeals had viewed Justice Kennedy's standard as a logical subset of the plurality's, the court's conclusion that the instructional error in this

case "may well have been harmless" under the plurality's standard, *ibid.*, would have applied *ipso facto* to the harmlessness inquiry under Justice Kennedy's standard.[8]

Neither precedent nor logic supports the court of appeals' conclusion that Justice Kennedy's "significant nexus" standard must be treated as the controlling rule of law even when it yields an outcome inconsistent with a controlling legal principle endorsed by eight Members of this Court. In *Marks* itself, the purpose and effect of treating the *Memoirs* plurality's rationale as the "narrowest" ground of decision was to give controlling effect to a legal rule—*i.e.*, that books possessing any redeeming social value may not be prohibited on the basis of their prurient appeal—on which a majority of the *Memoirs* Court had agreed. See pp. 20-21, *supra*. Here, by contrast, the Eleventh Circuit's flawed application of *Marks* thwarted rather than effectuated the will of a majority of this Court's Members. *Marks* does not support that result, and the court of appeals offered no other justification for that "bizarre outcome." *Johnson*, 467 F.3d at 64; see App., *infra*, 57a; *King*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force.").

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[8] The Eleventh Circuit incorrectly treated the "significant nexus" standard as the narrower of the two competing rationales based solely on the court's conclusion that "Justice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as 'navigable' more frequently than [the plurality's] test." App., *infra*, 25a. But the *Marks* test is designed to identify a legal principle that enjoys the support of a majority of the Court in a fragmented decision. It is not designed to gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce a particular result.

2. The Eleventh Circuit read *Marks* categorically to preclude consideration of the views of the *Rapanos* dissenters in identifying the legal rules established by that decision. See App., *infra*, 23a-24a. Taken in isolation, the *Marks* Court's statement that the "holding" of a fractured decision is the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," 430 U.S. at 193 (internal quotation marks omitted), might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746). Cf. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Grutter* and *Marks*, and noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis" in determining whether particular waters are covered by the CWA under the fractured decision in *Rapanos*).

Indeed, as the judges who dissented from the denial of rehearing en banc pointed out (see App., *infra*, 54a-55a), this Court has often considered dissenting Justices' views in order to ascertain the legal principles established by prior fractured decisions. See *United States* v. *Jacobsen*, 466 U.S. 109, 115-118 (1984) (holding that the controlling legal standard in a prior case was established by a principle adopted by two Justices who wrote separately in the majority and four Justices who

joined the dissent); *Alexander* v. *Choate*, 469 U.S. 287, 293 & nn.8-9 (1985) (deriving the "two-pronged holding" of a prior case from a two-Justice opinion announcing the judgment of the Court, two opinions concurring in the judgment, and two dissenting opinions); *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1007 (2008) (analyzing an opinion in a prior case concurring in part and concurring in the judgment, and a separate opinion in the same prior case concurring in part and dissenting in part, to identify a legal conclusion of "five Justices" to which the Court in the later case "adhere[d]"); *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668 n.15, 1671 (2007) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 413-414 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

In a fractured decision like *Rapanos*, no opinion for the Court exists and neither the plurality nor the concurring opinion is a "logical subset" of the other. In those circumstances, the principles on which a majority of the Court agreed may be illuminated by consideration of the dissenting Justices' views, particularly when, as here, the dissenting Justices have specifically identified the standards they would embrace. See *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting). Dissenting opinions that endorse legal principles articulated by Justices voting in the majority in a fractured decision such as

Rapanos may thus help to identify legal rules on which a majority of the Court agrees, and may thereby provide a basis for identifying the rule of law created by the case. Even though a dissenting opinion itself of course cannot supply a rule of law, consideration of the dissenting Justices' views, in cases with fragmented opinions and no narrowest ground for decision as in a traditional *Marks* analysis, may further the underlying purpose of the specific rule announced in *Marks*, *i.e.*, to effectuate the position of a majority of the Court.[9]

3. Review is warranted in this case not only to clarify the operation of the *Marks* rule—which is itself an important guidepost for interpreting this Court's decisions—but also to establish that waters that satisfy the *Rapanos* plurality's standard are "waters of the United States" under the CWA, as eight Justices in *Rapanos* agreed. The nation's waters include innumerable perennial or relatively permanent tributaries that connect to traditional navigable waters. The health and vitality of

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[9] Just as the views of eight Members of the Court should control in establishing CWA coverage on the facts of this case, the government could also establish CWA coverage of a particular water body by demonstrating a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's *Rapanos* concurrence. Such a demonstration would be sufficient under the views expressed by a majority of the *Rapanos* Court (Justice Kennedy and the four dissenters), whether or not the government also satisfied the plurality's standard for CWA coverage. See *Johnson*, 467 F.3d at 66 ("The federal government can establish jurisdiction over [particular] sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*."); *id.* at 64 (noting that this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court"). This case, however, does not present the question whether the CWA encompasses waters that are shown to satisfy Justice Kennedy's standard but are not shown to satisfy the plurality's.

those interconnected waters depends critically on protection of the tributary systems from pollutants that naturally wash downstream.

In this case, abundant record evidence demonstrated that the stream into which respondents discharged pollutants flowed year-round and that it ultimately fed into a traditional navigable river. See p. 10, *supra*. That evidence established that the stream was part of "the waters of the United States" under the standards adopted both by the four-Justice *Rapanos* plurality and by the four *Rapanos* dissenters. See 547 U.S. at 739, 742 (plurality opinion); *id.* at 810 & n.14 (Stevens, J., dissenting). Although the instructions given at trial would have permitted the jurors to find respondents guilty even if they concluded that Avondale Creek flowed intermittently, that error was harmless, under the standards adopted by eight Members of this Court in *Rapanos*, in light of the compelling record evidence presented to the jury that the flow was in fact perennial.

The court of appeals acknowledged that, under the *Rapanos* plurality's standard, the jury instructions' inclusion of intermittently flowing streams "may well have been harmless" error because the EPA expert "clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." App., *infra*, 29a. While the court thus recognized that its rejection of the plurality's standard "may be outcome-determinative," *ibid.*, it did not resolve that issue because of its incorrect selection of the "significant nexus" standard as the only controlling legal rule that can be derived from *Rapanos*. *Id.* at 30a n.20. That refusal even to consider the government's evidence of year-round flow to traditional navigable waters as rendering an instructional error harmless is fun-

damentally incorrect. There is no basis for setting aside the jury verdicts in this case absent a determination whether those verdicts can be sustained under the correct legal understanding of *Rapanos*. The judgment of the court of appeals should therefore be vacated and the case remanded for application of the correct legal standard to the evidence on harmless-error review.

C. The Question Presented In This Case Is One Of Great Practical Importance

The conflict created by the Eleventh Circuit has significant practical ramifications for the operation of a federal statute that affects countless waters, individuals, and corporations and that is vital to the protection of the aquatic environment. See App., *infra*, 58a-59a (Wilson, J., dissenting from the denial of rehearing en banc) (discussing the "exceptional importance" of the decision in this case in the Eleventh Circuit alone). We are informed by the relevant agencies that the vast majority of waters encompassed by the *Rapanos* plurality's standard could also be shown to bear a "significant nexus" to traditional navigable waters as that term is used in Justice Kennedy's concurrence. In many instances, however, it is substantially more efficient and straightforward for regulated entities, their consultants, and the government to verify whether a tributary is perennial and feeds into a traditional navigable water than to determine whether a "significant nexus" to traditional navigable waters exists. That is of particular importance in the enforcement context, where, under the "significant nexus" standard, juries would be asked to weigh often complex scientific evidence and the competing inferences to be drawn from expert testimony. And because Justice Kennedy's standard (at least until it is more

clearly elucidated by this Court or the lower courts) is less determinate than the plurality's, its application is likely to vary more widely from judge to judge, and from jury to jury.

Such uncertainty could seriously impede administration of the CWA programs EPA administers, particularly the NPDES permit program. See 33 U.S.C. 1342. Within the Eleventh Circuit, approximately 1500 of the 2300 NPDES permittees for which EPA has location information discharge into perennial streams that plainly satisfy the plurality standard. But in the wake of the Eleventh Circuit's requirement of a "significant nexus" showing for such waters (a nexus that the court of appeals apparently viewed not to be demonstrated by the perennial nature of the streams at issue here), existing NPDES permit holders who discharge into such waters may challenge EPA's authority to regulate them, either by direct challenge or by simply ignoring the permit requirements. New dischargers may decline to obtain permits. This could significantly expand the administrative burden in the NPDES program and necessitate increased enforcement actions and prosecutions. The circuit conflict may similarly hinder enforcement of the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, whose definition of the term "navigable waters," 33 U.S.C. 2701(21), tracks that of the CWA.

The Corps' administration of the Section 404 program (33 U.S.C. 1344) for discharges of dredged and fill material would likewise be impeded by a requirement that CWA coverage be established under the "significant nexus" standard. In administering that program, the Corps makes approximately 110,000 jurisdictional determinations each year, of which approximately 38,000 are formal (*i.e.*, "approved") determinations. See 33

C.F.R 331.2 (defining "jurisdictional determination"). During the past year, the three Corps districts whose areas of operations fall within the Eleventh Circuit issued approximately 6087 formal jurisdictional determinations. According to the Corps, in more than 90% of those determinations, the agency relied upon the *Rapanos* plurality's standard to establish CWA coverage, without additional analysis of a "significant nexus" to traditional navigable waters. We are informed that, within the Eleventh Circuit alone, approximately 28,215 additional hours of agency time would have been expended if the Corps had been required (as it now is under the court of appeals' decision in this case) to make all formal jurisdictional determinations under the "significant nexus" standard. That, in turn, will burden the regulated community by increasing the time and costs associated with obtaining a Section 404 permit.[10]

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[10] See, *e.g.*, Kenneth W. Starr, *The Roberts Court Gets Down to Business: The Business Cases*, 34 Pepp. L. Rev. 599, 606 (2007) (stating that, as a result of the fractured decision in *Rapanos*, "the planning commissioners, real estate developers, home owners, and the Sierra Club are left to languish in uncertainty"); G. W. Jones, Note, *Federal Wetlands Jurisdiction—The Quagmire of* Rapanos *v.* United States, 2 Pitt. J. Envtl. Pub. Health L. 79, 103 (2008) (explaining that the uncertainty as to which *Rapanos* standard controls will require the Corps "to make much more extensive determinations prior to granting or denying a fill permit," which "will only increase the already high costs associated with obtaining such a permit").

The petition for a writ of certiorari in *Lucas* v. *United States*, No. 07-1512, which is currently pending before this Court, also raises an issue concerning the standard or standards to be used in determining CWA coverage under the fractured decision in *Rapanos*. The petition in *Lucas*, and the briefs amicus curiae filed in support of that petition (one by the Pacific Legal Foundation and another by the National Association of Home Builders and the Chamber of Commerce), attest to the importance of the coverage question to members of the regulated com-

In other ways as well, the circuit conflict impedes the effective implementation of the CWA. Except in the First and Eleventh Circuits, the courts of appeals have not determined whether the CWA's coverage may be established through proof, without more, that the water into which a discharge occurs satisfies the *Rapanos* plurality's standard—and those two circuits diametrically disagree. The conflict and uncertainty pose especially serious difficulties in the criminal context. Individuals and corporations should not be immune from criminal penalties in one jurisdiction but subject to them in another. The conflict also jeopardizes the success of civil judicial and administrative CWA enforcement actions.

Unless and until this Court resolves the question presented here, the safest course for the government in a criminal prosecution or civil enforcement action is to attempt to establish CWA coverage under *both* the *Rapanos* plurality's standard and that of Justice Kennedy.[11] That burden, however, exceeds what *any* Mem-

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munity. The court of appeals in *Lucas*, however, expressly concluded that the evidence in that case was sufficient to establish CWA coverage *both* under the *Rapanos* plurality's standard *and* under that of Justice Kennedy. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir. 2008). In this case, by contrast, the Eleventh Circuit stated that the choice between the two standards "may be outcome-determinative." App., *infra*, 29a. This case therefore provides a more suitable vehicle for determining whether the CWA covers waters that are shown to satisfy the *Rapanos* plurality's standard but have not been shown to possess a "significant nexus" to traditional navigable waters.

[11] Some lower courts have analyzed particular waters under both the *Rapanos* plurality's standard and that of Justice Kennedy. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir. 2008), petition for cert. pending, No. 07-1512 (filed June 2, 2008); *United States* v. *Bailey*, 516 F. Supp. 2d 998, 1004-1011 (D. Minn. 2007), appeal pending, No. 08-1908 (8th Cir. filed Apr. 18, 2008); *United States* v. *Cundiff*, 480 F. Supp. 2d

her of the *Rapanos* Court believed to be required. And any effort to obtain jury verdicts under both standards (to ensure that a judgment would not be reversed on the ground that the wrong standard was utilized) would require potentially confusing jury instructions and special-verdict forms. Those consequences are significant in any case tried to a jury, but they are particularly onerous in the important area of environmental prosecutions, which often involve prolonged trials. Review by this Court is necessary to resolve the existing circuit conflict, to alleviate the substantial and unnecessary burdens that the conflict places upon the responsible agencies' administration of the CWA, and to ensure that a stream covered by the Act under the views of eight Justices is not placed outside the CWA's protections.

940, 946 (W.D. Ky. 2007), appeal pending, No. 07-5630 (6th Cir. filed May 14, 2007); *Simsbury-Avon Pres. Soc'y, LLC* v. *Metacon Gun Club*, 472 F. Supp. 2d 219, 226-230 (D. Conn. 2007), appeal pending, No. 07-0795-cv (2d Cir. argued Aug. 4, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-17019

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

CHARLES BARRY ROBISON, DEFENDANT

MCWANE, INC., DEFENDANT-APPELLANT

JAMES DELK, MICHAEL DEVINE, DEFENDANTS-
APPELLANTS-CROSS APPELLEES

Oct. 24, 2007

OPINION

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and FORRESTER,* District Judge.

HULL, Circuit Judge:

Defendants McWane, Inc. ("McWane"), James Delk ("Delk"), and Michael Devine ("Devine") appeal their convictions for their roles in a Clean Water Act ("CWA") conspiracy (Count 1), as well as their convictions for

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* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

substantive violations of the CWA (Counts 2, 3, 5, 7-19, 21, and 22).[1] After the defendants' convictions, the United States Supreme Court addressed how to define "navigable waters" under the CWA in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). The definition of "navigable waters" in the jury charge in this case was erroneous under *Rapanos*, and the government has not shown that the error was harmless. Accordingly, we must vacate defendants' CWA convictions and remand the case for a new trial.

McWane also appeals its conviction for making a false statement to the Environmental Protection Agency ("EPA") (Count 24).[2] Because McWane was entitled to a judgment of acquittal on that charge, we vacate McWane's conviction on Count 24 as well.

I. BACKGROUND

A. Defendants

Defendant McWane is a large manufacturer of cast iron pipe, flanges, valves, and fire hydrants. McWane has numerous manufacturing plants. This case concerns McWane's plant in Birmingham, Alabama (hereinafter "the plant" or "McWane's plant").

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[1] Counts 12-19, 21, and 22 of the superseding indictment only charged McWane and Delk, while Counts 2, 3, 5, and 7-11 charged McWane, Delk, and Devine. Before the case was submitted to the jury, the government dismissed Count 11 as to Devine.

[2] Count 24—the false statement count in the superseding indictment—was ultimately submitted to the jury as Count 23. For consistency, we refer to the false statement count throughout this opinion as "Count 24."

Defendants Delk and Devine, along with Charles "Barry" Robison and Donald Harbin, worked in management positions at McWane's plant at all relevant times.

Robison was McWane's Vice President of Environmental Affairs. Defendant Delk was the General Manager of the plant. Defendant Devine was the Plant Manager, and he reported to defendant Delk. Harbin was the Maintenance Manager, and he reported to defendant Devine.[3]

B. Avondale Creek

The CWA violations at issue involve McWane's discharge of pollutants into Avondale Creek, which is adjacent to McWane's plant.

Avondale Creek flows into another creek called Village Creek. In turn, Village Creek flows approximately twenty-eight miles into and through Bayview Lake, which was created by damming Village Creek. On the other side of Bayview Lake, Village Creek becomes Locust Fork, and Locust Fork flows approximately twenty miles out of Bayview Lake before it flows into the Black Warrior River.

At trial, the government presented testimony, *inter alia*, from an EPA investigator (Fritz Wagoner) that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek. Wagoner testified that there is "a continuous uninterrupted flow" not

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[3] When defendant Delk was hired as the General Manager—in 1998—Harbin was the Plant Manager. Defendant Delk demoted Harbin to the Maintenance Manager and hired defendant Devine to replace Harbin as the Plant Manager.

only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River.

On cross-examination, Wagoner admitted that he did not conduct a "tracer test" to check the flow of Avondale Creek into the Black Warrior River. Wagoner explained that a "tracer test" is a procedure whereby a "concentrated dye" is put into a body of water and tracked to determine "where that water body flows." Wagoner conducted no tests to measure the volume of water discharged from Avondale Creek or between the bodies of water that connect Avondale Creek and the Black Warrior River. He conceded that the water level in Avondale Creek was so low that he was able to walk through Avondale Creek all the way down to its intersection with Village Creek. Furthermore, Wagoner testified that Village Creek is dammed (creating Bayview Lake) and that the dam runs "all the way across Village Creek." Wagoner's only site visit was in April 2005. This was more than four years after the violations at issue in this case.

The government presented no evidence, through Wagoner or otherwise, of the chemical, physical, or biological effect that Avondale Creek's waters had or might have had on the Black Warrior River. Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River.

C. Defendants' conduct

McWane's plant manufactures eighteen-foot and twenty-foot lengths of pipe. McWane utilizes a great deal of water in its pipe manufacturing processes. The water that runs out of the pipe manufacturing machines

is generally referred to as "process wastewater." The evidence at trial established that process wastewater accumulated in large amounts in basements under McWane's "eighteen-foot machine" and "twenty-foot machine." The process wastewater contained various contaminants, including hydraulic oil, excess iron, and trash.

The CWA authorizes the EPA, and states with programs approved by the EPA, to issue permits for the discharge of pollutants, in compliance with the National Pollutant Discharge Elimination Systems ("NPDES"). These permits are known as NPDES permits. The Alabama Department of Environmental Management ("ADEM") administers the NPDES program in Alabama.

McWane obtained an NPDES permit from ADEM that authorized McWane to discharge some process wastewater. Specifically, McWane's NPDES permit allowed it to discharge some treated process wastewater into Avondale Creek, but only from one discharge point at the plant ("DSN001"), and only if other discharge limits and bookkeeping requirements were met. McWane's NPDES permit also allowed it to discharge "storm water runoff from industrial activity" from other discharge points at the plant ("DSN002" through "DSN020"). McWane, however, was not permitted to discharge process wastewater from any point at the plant other than DSN001.

At trial, the government established that McWane discharged process wastewater into Avondale Creek from discharge points other than DSN001, in violation of the express provisions of its NPDES permit. Numerous former McWane employees testified that the plant was

in disarray by the late 1990s and that process wastewater was all over the plant. Process wastewater overflowed on a regular basis when it was pumped from the eighteen-foot machine and twenty-foot machine basements. The process wastewater would then spill into the storm water runoff discharge points (DSN002-DSN020) and flow into Avondale Creek.

One McWane employee described the extent of the process wastewater discharges as "[e]nough to drown a small village." Indeed, multiple witnesses testified that process wastewater from McWane's plant was regularly discharged into Avondale Creek. Harbin, for instance, testified that between May 1999 and January 2001, process wastewater was discharged into storm drains fifteen out of every twenty operating days per month. Other witnesses testified that the plant's basements were pumped (which led to the corresponding noncompliant wastewater discharge) every Friday night.

McWane's NPDES permit listed defendant Delk as one of two people with the authority and responsibility to prevent and abate violations of ADEM's regulations. Trial testimony established that defendant Delk was "everybody's boss" at the plant, and that on multiple occasions, defendant Delk ordered McWane employees to pump process wastewater from the basements, despite knowing that the wastewater had nowhere to go but Avondale Creek. Further testimony established that defendant Delk watched as wastewater spilled or was pumped into the center courtyard of the plant, and that Delk once instructed Harbin to falsify a water sample for inspectors.

Likewise, defendant Devine also ordered McWane employees to violate the NPDES permit. One former

employee, Troy Venable, testified that he overheard a conversation between defendant Devine and a McWane maintenance foreman in which Devine said that it would be "easier" for McWane to pay off its fines than to pay $70,000 to fix one of the sources of the problem. There was also testimony about two separate incidents in which defendant Devine ordered that excess process wastewater be pumped from the basements despite there being no appropriate place to put the water, and told employees that he did not care how the water got out of the plant as long as it was gone.

Additionally, McWane's former safety and personnel director, John Walsh, testified that on one occasion, an ADEM inspector came to inquire about pollutant discharges from the storm water discharge runoff points. According to Walsh, defendant Devine directed him to lie to the ADEM inspector and tell the inspector that the cause of the discharges was McWane's test-flushing of fire hydrants. Walsh testified that he complied with defendant Devine's instructions because he "was told to" and feared that if he did not, he would lose his job.

The EPA inspected the plant in April 2000, and subsequently required McWane to submit plant inspection reports and other documents concerning the plant. McWane responded with two separate document productions, on August 17, 2000, and September 15, 2000. The document productions were accompanied by certifications signed by Robison.

D. Indictment

In May 2004, a twenty-five count indictment was issued against McWane, Delk, Devine, Robison, and Don-

ald Bills (the plant engineer). The indictment was superseded in July 2004.

Count 1 of the superseding indictment alleged that defendants McWane, Delk, Devine, Robison, and Bills conspired: (1) to knowingly discharge pollutants into the waters of the United States in violation of McWane's NPDES permit and the CWA; (2) to defraud the United States; (3) to knowingly and willfully make false statements; and (4) to obstruct justice. Counts 2-11 alleged that defendants McWane, Delk, and Devine knowingly caused discharges of pollutants from a storm water outfall (DSN002) into Avondale Creek in each month from May 1999 through February 2000, in violation of McWane's NPDES permit and the CWA. Counts 12-22 accused McWane and Delk (but not Devine) of similar NPDES and CWA violations from March 2000 through January 2001.

Count 23 alleged that McWane, Delk, and Devine knowingly caused discharges of pollutants from the wastewater outfall (DSN001) on May 26, 1999, in violation of the maximum limits allowed by McWane's NPDES permit and the CWA. Count 24 charged McWane and Robison with making false statements to the EPA on or about August 17, 2000, and September 15, 2000. Finally, Count 25 alleged that McWane obstructed justice by providing false and misleading information to the EPA regarding its discharge of wastewater.

E. Trial

A jury trial was held in May and June 2005. At the close of the government's evidence, the district court: (1) dismissed Bills from the case;[4] (2) dismissed Robison

[4] Bills is not a party to this appeal.

from Count 1 (conspiracy), leaving Robison only in Count 24; (3) struck three of the four objects of the conspiracy in Count 1, leaving the sole object of the conspiracy as the knowing discharge of pollutants into the waters of the United States in violation of the NPDES permit and the CWA; and (4) dismissed Counts 23 and 25 in their entirety.

On June 10, 2005, the jury returned guilty verdicts on all remaining counts except Counts 4, 6, and 20. All three appellants here, McWane, Delk, and Devine, were convicted of conspiracy to violate the CWA (Count 1), as well as multiple substantive violations of the CWA. McWane, Delk, and Devine were convicted on Counts 2, 3, 5, and 7-10, and McWane and Delk were also convicted on Counts 11-19, 21, and 22. Additionally, McWane and Robison were convicted of making a false statement to the EPA (Count 24).[5]

F. Sentences

On December 5, 2005, the district court sentenced the defendants.

The district court sentenced: (1) Delk to 36 months' probation (including 6 months of nighttime home detention), and a fine of $90,000;[6] (2) Devine to 24 months'

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[5] Robison is no longer a party to this appeal. Robison initially filed a notice of appeal in this case, but he dismissed his appeal here as part of his resolution of a separate criminal case in Utah involving McWane's violations of the Clean Air Act. *See United States v. McWane, Inc.*, No. 2:05-cr-00811 (D. Utah Feb. 8, 2006).

[6] Defendant Delk's base offense level was 6. After a 4-level enhancement for Delk's leader/organizer role in the offense and other adjustments, the district court calculated Delk's total offense level to be 16. With a criminal history category of I, Delk's advisory guidelines range was 21-27 months' imprisonment.

probation (including 3 months of nighttime home detention), and a fine of $35,000;[7] and (3) McWane to 60 months' probation and a fine of $5 million.[8]

II. DISCUSSION

The parties' disagreement as to what constitutes a "navigable water" under the CWA is at the heart of this appeal.

A. Jury instruction on "navigable waters"

The CWA generally prohibits the discharge of pollutants into "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Under the CWA, "navigable waters" are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The parties agree that the definition of "navigable waters" is a key element of the CWA criminal offenses in this case.

Based on the Supreme Court's *Rapanos* decision, defendants contend that Avondale Creek is not a "navigable water" within the meaning of the CWA, and that the district court erroneously instructed the jury as to the definition of the term "navigable waters." The gov-

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[7] Defendant Devine's base offense level was 6. After a 3-level enhancement for Devine's manager/supervisor role in the offense and other adjustments, the district court calculated Devine's total offense level to be 15. With a criminal history category of I, Devine's advisory guidelines range was 18-24 months' imprisonment.

[8] The government cross-appeals the sentences of Delk and Devine. Additionally, Delk and Devine attempt to raise a sentencing issue in their response briefs to the government's cross-appeal. Because we vacate Delk's and Devine's convictions, we do not address any of the parties' sentencing arguments and dismiss the government's cross-appeal without prejudice.

ernment responds that Avondale Creek's connection with the Black Warrior River and/or Village Creek renders Avondale Creek a "navigable water" within the meaning of the CWA.[9]

The problem in this case arises because the district court charged the jury that "navigable waters" include "any stream which may eventually flow into a navigable stream or river," and that such stream may be manmade and flow "only intermittently," as follows:

> As to Counts 2 through 22, a "water of the United States" includes any stream which may eventually flow into a navigable stream or river. The Government does not have to prove that the stream into which the discharge is made is itself navigable in fact. What it must prove is that the stream into which the discharge is made may eventually flow directly or indirectly into a navigable stream or river. *The stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a naviga-*

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[9] We review the legal correctness of the district court's "navigable waters" jury instruction *de novo*. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). We reject the government's argument that defendants failed to properly preserve an objection to the "navigable waters" jury instruction. Defendants repeatedly made clear to the district court their position as to the appropriate definition of a "navigable water" under the CWA. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). Thus, our review is *de novo*, not for plain error. Under *de novo* review, if we determine that there was error, we still must consider whether the government has carried its burden to show that the error was harmless. *See* Fed. R. Crim. P. 52(a).

> *ble stream or river whose use affects interstate commerce.*
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> A navigable stream or river is defined as one that is used or is susceptible of being used in its ordinary condition, as a highway for interstate commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

(Emphasis added.)

The district court's jury charge was based, *inter alia*, on this Court's decision in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997). In *Eidson*, we observed: (1) that Congress chose to define broadly the waters covered by the CWA; (2) that it was "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce"; and (3) that courts repeatedly had recognized that tributaries to waters affecting interstate commerce—even when man-made or intermittently flowing—were subject to the CWA. *Eidson*, 108 F.3d at 1341-42.

However, the defendants' trial occurred before *Rapanos*, and the Supreme Court indicated in *Rapanos* that *Eidson's* "expansive definition" of "'tributaries'" is no longer good law. *Rapanos*, 126 S. Ct. at 2217 (plurality opinion) (citing, *inter alia*, *Eidson*, 108 F.3d at 1340-42). Even the government here tacitly concedes that the jury charge given by the district court in this case was erroneous to some extent in light of *Rapanos*. *See* Resp. Br. of United States, at 24-25. Nevertheless, the government contends that any error in the jury charge was harmless and does not require reversal.

Accordingly, we consider *Rapanos* in detail in order to determine exactly how and to what extent the district court's "navigable waters" instruction was erroneous. We then consider whether the incorrect jury instruction was harmless error.

B. Rapanos and the proper definition of "navigable waters"

In *Rapanos*, which involved two consolidated cases, the Supreme Court addressed how the statutory term "navigable waters" should be construed under the CWA. The consolidated cases involved the discharge of pollutants into four separate wetlands. *See Rapanos*, 126 S. Ct. at 2219 (plurality opinion). The wetlands at issue varied in terms of their precise connections to navigable-in-fact bodies of water, but the wetlands were all "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." *Id.* In the case of three of the four wetlands, it was "not clear whether the connections between the[ ] wetlands and the nearby drains and ditches [were] continuous or intermittent, or whether the nearby drains and ditches contain-[ed] continuous or merely occasional flows of water." *Id.* In the case of the fourth wetland, the ditch running alongside the wetland was "separated from it by a 4-foot-wide man-made berm" that was "largely or entirely impermeable to water." *Id.*

In both cases, the Sixth Circuit concluded that the wetlands were covered by the CWA. *Id.* The Supreme Court consolidated the cases and granted certiorari to decide whether the wetlands actually constituted "waters of the United States" under the CWA. *Id.* at 2220.

The entire Supreme Court agreed that the term "navigable waters" encompasses something more than traditionally "navigable-in-fact" waters. *Id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring); *id.* at 2255 (Stevens, J., dissenting). However, five Justices concluded that remand was necessary for consideration of whether the wetlands at issue were "navigable waters" covered by the CWA, and whether the EPA and the Army Corps of Engineers had impermissibly extended their regulatory authority under the CWA. *Id.* at 2220 (plurality opinion); *id.* at 2235-36 (Roberts, C.J., concurring); *id.* at 2236, 2241, 2251-52 (Kennedy, J., concurring).

Despite agreeing that the remand was necessary for further consideration of whether the wetlands at issue were covered by the CWA, the five-Justice majority fractured with regard to the proper definition of the term "navigable waters." Justice Scalia wrote for a four-Justice plurality, while Justice Kennedy provided the fifth vote for reversal. Justice Stevens dissented, joined by the remaining three Justices.[10]

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[10] Chief Justice Roberts filed a short separate concurrence but also joined Justice Scalia's plurality opinion, along with Justices Thomas and Alito; Justice Breyer filed a short separate dissent but also joined Justice Stevens's dissenting opinion, along with Justices Souter and Ginsburg. Thus, the three "main" opinions in *Rapanos* are Justice Scalia's plurality opinion (four Justices); Justice Kennedy's concurring opinion (one Justice); and Justice Stevens's dissenting opinion (four Justices).

1. Justice Scalia's plurality opinion

Although Justice Scalia's plurality opinion recognized that the statutory term " 'navigable waters' includes something more than traditional navigable waters," the plurality also emphasized that "the qualifier 'navigable' is not devoid of significance." *Id.* at 2220 (plurality opinion). According to the plurality, "navigable waters" include only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 2225 (alteration in original) (citation omitted). The plurality emphasized that bodies of water such as streams, oceans, rivers, and lakes (*i.e.*, "navigable waters") are "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 2221.

Moreover, while the plurality was of the view that "relatively continuous flow is a *necessary* condition for qualification as a 'water,'" relatively continuous flow, in and of itself, is "not an *adequate* condition" under the plurality's test. *Id.* at 2223 n.7.

The plurality also applied its test to the specific wetlands at issue in *Rapanos*. Noting that under prior precedent wetlands "adjacent to" navigable bodies of water were considered "waters of the United States," the plurality stated that "*only* those wetlands with a *continuous surface connection* to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 2226 (second emphasis added). "Wetlands with only an intermittent, physically remote

hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters. . . ." *Id.* To summarize, the plurality's test for "establishing that wetlands . . . are covered by the Act requires two findings: First, that the adjacent channel [to the wetland] contains 'a water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227 (alteration omitted).

The plurality also noted that although it did not reach the issue, there was "no reason to suppose that [its] construction . . . [would] significantly affect[ ] the enforcement" of the CWA, in that "lower courts . . . have not characterized intermittent channels as 'waters of the United States.'" *Id.* The plurality observed that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the CWA], even if the pollutants discharged . . . do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* (citations omitted).

2. Justice Kennedy's concurrence

Justice Kennedy supplied the fifth vote for reversal and agreed with the plurality that the Sixth Circuit had failed to apply the proper test as to what constitutes a "navigable water." *See id.* at 2236 (Kennedy, J., concurring) (stating that the Sixth Circuit "recognized the [proper] test's applicability," but failed to apply it cor-

rectly). However, Justice Kennedy disagreed with the plurality over the substance of the proper test.

According to Justice Kennedy, the Supreme Court actually established the test for determining whether a "water or wetland" constitutes a "navigable water" under the CWA five years prior to *Rapanos*, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("*SWANCC*"). *See Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring). Citing *SWANCC*, Justice Kennedy wrote in his *Rapanos* concurrence that the applicable test for determining whether or not a "water or wetland" is "navigable" is the so-called "significant nexus" test. *See id.* at 2236 (Kennedy, J., concurring) (citing SWANCC, 531 U.S. at 167, 172, 121 S. Ct. at 680, 683). In Justice Kennedy's view, a "water or wetland" can only be "navigable" under the CWA if it possesses a " 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.*[11]

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[11] In reviewing the Supreme Court's prior precedent, Justice Kennedy also noted: "Taken together these cases establish that in some instances . . . the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus [in these latter instances], jurisdiction under the Act is lacking. Because neither the plurality or the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary." *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

Because *Rapanos* was a wetlands case, Justice Kennedy's concurrence then focused on when a wetland meets the "significant nexus" test. A wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Justice Kennedy also emphasized that a "mere hydrologic connection" between a wetland and a navigable-in-fact body of water would not necessarily be sufficiently substantial to meet his "significant nexus" test. *Id.* at 2250-51. According to Justice Kennedy, a "mere hydrologic connection . . . may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251. Under Justice Kennedy's test, the "required nexus must be assessed in terms of the statute's goals and purposes," which are to " 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 2248 (citation omitted).

3. Justice Stevens's dissent

Justice Stevens, writing for himself and three other Justices, would have upheld the Army Corps of Engineers' and EPA's broad interpretation of CWA jurisdiction and concluded that the wetlands at issue in *Rapanos* were "navigable waters," i.e., "waters of the United States." *Id.* at 2252 (Stevens, J., dissenting).

As aptly noted by Chief Justice Roberts in his concurrence, neither Justice Scalia's plurality opinion, Justice Kennedy's concurrence, nor Justice Stevens's dissent "command[ed] a majority of the Court on precisely how to read Congress'[s] limits on the reach" of the CWA. *Id.* at 2236 (Roberts, C.J., concurring). In addition, Justice Stevens's dissent noted that "while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand." *Id.* at 2265 (Stevens, J., dissenting).

Justice Stevens's dissent then stated that the four Justices joining his opinion would uphold CWA jurisdiction in all cases in which either the plurality's or Justice Kennedy's test is met, as follows:

> Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's *or* Justice Kennedy's test is satisfied —on remand each of the judgments should be reinstated if *either* of those tests is met.

Id. (first emphasis added).

C. The governing rule of Rapanos

Given the various opinions, the parties dispute what constitutes the governing definition of "navigable waters" under *Rapanos*. The defendants argue that only Justice Kennedy's concurrence (i.e., the "significant nexus" test) applies. The government responds that if Avondale Creek can be shown to satisfy *either* the plurality's test or Justice Kennedy's test, that is sufficient to sustain CWA jurisdiction in this case.

The circuits likewise are split on the question of which *Rapanos* opinion provides the holding. Both the Seventh and the Ninth Circuits concluded that Justice Kennedy's concurrence controls and adopted the "significant nexus" test. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) ("*River Watch II*");[12] *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006), *cert. denied*,—U.S.—, 128 S. Ct. 45, 76 U.S.L.W. 3156, 2007 WL 1035893 (U.S. Oct. 1, 2007) (No. 06-1331). The First Circuit, on the other hand, concluded that because the dissenting *Rapanos* Justices would find jurisdiction under either Justice Scalia's plurality test or Justice Kennedy's "significant nexus" test, "'the United States may elect to prove jurisdiction under either test.'" *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (citation omitted), cert. denied,—U.S.—, 128 S. Ct. 375, 76 U.S.L.W. 3186, 2007 WL 1999079 (U.S. Oct. 9, 2007) (No. 07-9). Because the Ninth Circuit in *River Watch II* ex-

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[12] The Ninth Circuit's *River Watch* case resulted in two opinions. In *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) ("*River Watch I*"), the issue was whether a rock quarry pit called "Basalt Pond" was subject to the CWA. Basalt Pond contained wetlands that were adjacent to a navigable-in-fact river. Applying Justice Kennedy's test, the Ninth Circuit concluded that "Basalt Pond and its wetlands possess . . . a 'significant nexus' to waters that are navigable in fact, because the Pond waters seep directly into the navigable Russian River." *River Watch I*, 457 F.3d at 1025; *see also S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (stating that Justice Kennedy's *Rapanos* concurrence is "controlling").

Subsequently, in August 2007, the Ninth Circuit withdrew *River Watch I* and substituted an opinion that contained some additional explanation as to why Justice Kennedy's *Rapanos* test was "controlling . . . for [the *River Watch*] case" as well as for "almost all cases." *River Watch II*, 496 F.3d at 999-1000.

pressly adopted the Seventh Circuit's reasoning in *Gerke*, we review *Gerke* in detail, and then *Johnson*.

In *Gerke*, the Seventh Circuit, faced with a Supreme Court remand "in light of *Rapanos*," addressed which *Rapanos* opinion governed the further stages of the case before it. *Gerke*, 464 F.3d at 724-25. Citing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L. Ed. 2d 260 (1977), the Seventh Circuit first noted that when a majority of the Supreme Court agrees only on the result of a case, lower courts "are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Gerke*, 464 F.3d at 724. The *Gerke* court explained that it found Justice Kennedy's test to be "narrower (so far as reining in federal authority is concerned) . . . in most cases, though not in all . . . ." *Id.* at 724-25.

In support, the *Gerke* court noted that "[t]he plurality Justices [also] thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that 'Justice Kennedy tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again.'" *Id.* at 724 (quoting *Rapanos*, 126 S. Ct. at 2234 n. 15 (plurality opinion)). In that regard, the *Gerke* court observed that Justice Kennedy's concurrence "expressly rejected two 'limitations' imposed by the plurality on federal authority over wetlands" under the CWA. *Id.* (citation omitted).

The *Gerke* court surmised that in some wetlands cases Justice Kennedy would vote against finding CWA jurisdiction due to the lack of a "significant nexus," even when the plurality and the dissenting Justices would

vote for CWA jurisdiction due to a "surface-water connection" between "wetlands (however remote)" and "a continuously flowing stream (however small)." *Id.* at 725 (quotation marks and citation omitted). However, the *Gerke* court dismissed such instances as "rare" and concluded that, "as a practical matter," Justice Kennedy's concurrence provides "the least common denominator." *Id.*

In contrast, the First Circuit in *Johnson* determined that it would uphold CWA jurisdiction in those cases in which *either* Justice Scalia's test or Justice Kennedy's test was satisfied. *Johnson*, 467 F.3d at 64-65. Since—per Justice Stevens's dissent—the four dissenting Justices in Rapanos would vote to uphold CWA jurisdiction whenever either of the two tests were met, the First Circuit reasoned that the "simple and pragmatic" way to determine the governing standard was to find CWA jurisdiction in either situation. *Id.* at 64.

The First Circuit acknowledged *Marks*'s language that the holding of a fractured decision "is the position of the Justices 'who *concurred in the judgments* on the narrowest grounds . . . .'" *Id.* at 65 (quoting *Marks*, 430 U.S. at 193, 97 S. Ct. at 993). The First Circuit nevertheless cited various post-*Marks* cases in which, in the First Circuit's view, the Supreme Court itself had examined not only plurality and concurring opinions, but also dissenting opinions, in order to determine the holding of an earlier, fragmented Supreme Court decision. *See id.* at 65-66. The First Circuit concluded that its approach was therefore "particularly sound given that the Su-

preme Court itself has moved away from [rigid application of] the *Marks* formula." *Id.* at 65.[13]

For the reasons stated below, we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's "significant nexus" test provides the governing rule of *Rapanos*.

Marks expressly directs lower courts, including this Court, that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding . . . may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest* grounds." *Marks*, 430 U.S. at 193, 97 S. Ct. at 993 (emphasis added) (quotation marks and citation omitted); *see also United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1136 n.6 (11th Cir.), *cert. denied*,—U.S.—, 127 S. Ct. 146, 166 L. Ed. 2d 106 (2006). The "narrowest grounds" is understood as the "less far-reaching" common ground. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001). We simply cannot avoid the command of *Marks*.

We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision. In our view, *Marks* does *not* direct

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[13] According to the First Circuit, "'*Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions.'" *Johnson*, 467 F.3d at 63-64 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)). In the First Circuit's view, the "shortcomings of the *Marks* formulation in applying *Rapanos*" were actually highlighted by *Gerke*, in which the Seventh Circuit observed that there would be some cases in which the plurality's test would be satisfied, but Justice Kennedy's test would not, and vice-versa. *Id.* at 64.

lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. *See King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."). *Marks* talks about those who "concurred in the judgment[ ]," not those who did not join the judgment. *Marks*, 430 U.S. at 193, 97 S.Ct. at 993. It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an "either/or" test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied. *See Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting). The fact that the dissenting Justices would uphold CWA jurisdiction under both Justice Scalia's test and Justice Kennedy's test is of no moment under *Marks*. Further, when the Supreme Court's Justices are interpreting their own prior opinions, they can always reconsider them and thus may look more broadly to the rationale in a dissent. We do not have that luxury.[14]

Thus, pursuant to *Marks*, we are left to determine which of the positions taken by the *Rapanos* Justices concurring in the judgment is the "narrowest," i.e., the least "far-reaching." *See Marks*, 430 U.S. at 193, 97 S. Ct. at 993; *Bd. of Regents*, 263 F.3d at 1247. The issue becomes whether the definition of "navigable waters" in the plurality or concurring opinions in Rapanos was less far-reaching (i.e., less-restrictive of CWA jurisdiction). *See Gerke*, 464 F.3d at 724-25.

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[14] The First Circuit's *Johnson* decision is nevertheless correct on this point: *Marks* does not "translate easily" to *Rapanos*. *Johnson*, 467 F.3d at 64.

Notably, Justice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as "navigable" more frequently than Justice Scalia's test. *See Gerke*, 464 F.3d at 724-25; *Rapanos*, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting); *see also Johnson*, 467 F.3d at 64. This is because Justice Kennedy's concurrence rejected two "limitations" imposed by the plurality's test on the definition of "navigable waters." *Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring). Specifically, Justice Kennedy's concurrence rejected the plurality's requirement that "navigable waters" must be "relatively permanent, standing or flowing bodies of water," and also rejected the plurality's requirement of a "continuous surface connection." *Id.* at 2242-44 (quotation marks and citations omitted). As discussed later, in factual circumstances different from *Rapanos*, Justice Scalia's test may be less restrictive of CWA jurisdiction; however, in determining the governing holding in *Rapanos*, we cannot disconnect the facts in the case from the various opinions and determine which opinion is narrower in the abstract. Thus, pursuant to *Marks*, we adopt Justice Kennedy's "significant nexus" test as the governing definition of "navigable waters" under *Rapanos*. *See Gerke*, 464 F.3d at 725; *River Watch II*, 496 F.3d at 999-1000.

D. The jury instruction was erroneous and not harmless error

We next consider whether the district court's jury charge comported with Justice Kennedy's "significant nexus" test.[15]

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[15] The government tacitly concedes that the jury charge did not meet Justice Kennedy's "significant nexus" test. *See* Resp. Br. of United States at 24-25 ("The defendants correctly point out that the[ ] instructions do not precisely meet . . . . Justice Kennedy's standard . . . .").

Again, under Justice Kennedy's concurrence, a water can be considered "navigable" under the CWA only if it possesses a "significant nexus" to waters that "are or were navigable in fact or that could reasonably be so made." *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring). Moreover, a "mere hydrologic connection" will not necessarily be enough to satisfy the "significant nexus" test. *Id.* at 2250-51. The district court here did not mention the phrase "significant nexus" in its "navigable waters" instruction to the jury or advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River. Rather, the district court instructed the jury that a continuous or intermittent flow into a navigable-in-fact body of water would be sufficient to bring Avondale Creek within the reach of the CWA. As such, the instruction did not satisfy Justice Kennedy's "significant nexus" test and was erroneous.

Moreover, the government bears the burden of establishing that the jury charge error was harmless. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35 (1999) (concluding that "the omission of an element [from a jury instruction] is an error that is subject to harmless-error analysis"); *United States v. Olano*, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993) (when a defendant has made a timely objection and harmless-error review applies, the government has the burden of establishing that any error was harmless); *United States v. Mathenia*, 409 F.3d 1289, 1291-92 (11th Cir. 2005) (same).

In order to carry its burden, the government must establish that the error did not "affect [defendants'] substantial rights." Fed. R. Crim. P. 52(a). We have explained that in the case of non-constitutional error,[16] the government can meet this burden by showing that the error "did not affect the verdict, 'or had but very slight effect.'" *United States v. Hornaday*, 392 F.3d 1306, 1315 (11th Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946)). If the government can establish " 'with fair assurance . . . that the judgment was not substantially swayed by the error,' the judgment is due to be affirmed even though there was error." *Id.* at 1315-16 (quoting *Kotteakos*, 328 U.S. at 764, 66 S. Ct. at 1248). Nevertheless, "[t]he non-constitutional harmless error standard is not easy for the government to meet. It is as difficult for the government to meet that standard as it is for a defendant to meet the third-prong prejudice standard for plain error review." *Mathenia*, 409 F.3d at 1292.

Here, the government failed to satisfy its burden. Although Wagoner (the EPA investigator) testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River. The government did not present any evidence, through Wagoner or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the

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[16] We need not reach the question of whether the *Rapanos* error in this case was constitutional or non-constitutional, because, as explained momentarily, we conclude that the *Rapanos* error here was not harmless even under the less demanding harmless-error test for non-constitutional error.

Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River.[17] Thus, the government failed to establish that the jury instruction error did not affect the jury's verdict or had but very slight effect, and the district court's "navigable waters" instruction was not harmless error.[18]

We recognize that the government, attempting to show harmless error, stresses that it presented evidence of a continuous flow between Avondale Creek (a relatively permanent, fixed body of water) and the Black Warrior River (a navigable-in-fact water), and argues that this evidence satisfies Justice Scalia's test. The government also emphasizes that even the Seventh Circuit in *Gerke* noted that there may be some cases in which Justice Kennedy would find no CWA jurisdiction, but Justice Scalia and the dissenting Justices *would*, and that as a practical matter (i.e., counting the *Rapanos*

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[17] We further note that prior to trial, the district court denied defendants' motion to dismiss the indictment and indicated that it would apply a broad, *Eidson*-based definition of "navigable waters" under which the government would not need to prove that pollutants actually reached a navigable body of water. Defendants thus arguably had no incentive to put on evidence of any lack of "significant nexus" between Avondale Creek and the Black Warrior River. *See, e.g., O'Connor v. Ohio*, 385 U.S. 92, 93, 87 S. Ct. 252, 253, 17 L. Ed. 2d 189 (1966) (declining to penalize criminal defendant for failing to anticipate a new rule of law announced after the defendant's trial).

[18] Because Avondale Creek is not adjacent to the Black Warrior River, but separated by Village Creek, Bayview Lake, and Locust Fork, there is no claim in this case that the "significant nexus" test could be met by the adjacency of Avondale Creek and the Black Warrior River. *See supra* note 11.

votes), defendants' convictions should be affirmed under Justice Scalia's test.

This case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test, despite the fact that Justice Kennedy's test, as applied in *Rapanos*, would treat more waters as within the scope of the CWA. *See Gerke*, 464 F.3d at 725 (recognizing the potential for such cases but classifying them as "rare"). To be sure, the district court's jury instruction was still erroneous even under Justice Scalia's plurality opinion, because the instruction allowed the jury to find that defendants' discharges were into a "navigable water" even if the jury also concluded that Avondale Creek flowed "only intermittently."[19] But under *Justice Scalia's* test, that error may well have been harmless, because Wagoner, the EPA investigator, clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River. Under Justice Scalia's test, the district court's jury instruction error arguably "did not affect the verdict, 'or had but very slight effect.'" *Hornaday*, 392 F.3d at 1315 (citation omitted). Thus, the decision as to which *Rapanos* test applies may be outcome-determinative in this case, and so it is not surprising that the government advocates a practical, *Johnson*-style approach whereby all

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[19] Under Justice Scalia's plurality opinion, a "navigable water" only includes relatively permanent, standing, or continuously flowing "fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 126 S. Ct. at 2221-22, 2225.

votes—from plurality, concurring, and dissenting Justices—are counted.[20]

Nevertheless, as we have already discussed, *Marks* requires us to adopt the narrowest view of the Justices who concurred in the judgment in *Rapanos*. Thus, Justice Kennedy's test is the test against which we have measured the district court's jury instruction for harmless error. Justice Kennedy's test is also the test that the district court must apply on remand, for the reasons explained.[21]

E. Other CWA arguments

Defendants raise several other arguments related to their CWA convictions, all of which lack merit.

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[20] We also need not, and do not, determine whether the government in fact established harmless error under Justice Scalia's plurality opinion in *Rapanos*, because, as discussed, it would be inconsistent with *Marks* for us to follow and apply Justice Scalia's opinion. Indeed, defendants point out that Wagoner admitted on cross-examination, *inter alia*, that he did not conduct any "tracer tests" to verify continuous flow between Avondale Creek and the Black Warrior River; that he conducted no tests to measure the volume of discharge from Avondale Creek or between the bodies of water connecting Avondale Creek and the Black Warrior River; and that the water level of Avondale Creek was low enough that he was able to walk its length. Furthermore, defendants had no incentive to present evidence regarding a lack of continuous flow, because the district court clarified prior to trial that its definition of "navigable waters" would include waters with either continuous or intermittent flow. *See also supra* note 17.

[21] We express no opinion as to whether Avondale Creek does or does not actually satisfy Justice Kennedy's test; that is a question for the jury in the first instance.

First, all defendants contend that the district court's "navigable waters" error, discussed *supra*, entitles them to judgments of acquittal, and not merely new trials, because there was insufficient evidence that defendants discharged any process wastewater into a *Rapanos*-defined "navigable water."[22]

Preliminarily, we observe that on appeal, defendants do not contend that there was insufficient evidence that their discharges were into a "navigable water" as that term was *incorrectly* defined for the jury by the district court in the actual trial. Indeed, the government presented sufficient evidence that defendants' discharges were into a "navigable water" as the term was incorrectly defined by the district court, and so acquittal is not warranted on that ground.

Rather, defendants' contention is that they are entitled to judgments of acquittal based on the district court's *Rapanos* error. This argument, however, ignores our precedent stating that "[r]emand for a new trial is the appropriate remedy where . . . [any] insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency." *United States v. Sanchez-Corcino*, 85 F.3d 549, 554 n.4 (11th Cir. 1996), overruled on other grounds by *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998). Here, we need not evaluate whether there was insufficient evidence that defendants' discharges were into

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[22] We review the sufficiency of the evidence *de novo*, drawing all reasonable inferences in favor of the government. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir. 2005), *cert. denied*, 547 U.S. 1047, 126 S. Ct. 1635, 164 L. Ed. 2d 346 (2006).

"navigable waters" as that term is properly defined under *Rapanos*. Instead, it is enough to note that the district court erroneously defined "navigable water" and made it clear to the parties far in advance of trial that it would continue to use its erroneous definition throughout the case. That decision deprived the government of any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's "significant nexus" test.[23] Thus, under *Sanchez-Corcino*, we conclude that remand for a new trial is the appropriate remedy in this case.

Second, all defendants contend that there was insufficient evidence that any discharges of process wastewater occurred in specific months, as charged in the indictment, entitling defendants to a judgment of acquittal. However, defendants concede that the government put forth sufficient evidence that five of the charged CWA violations (Counts 2, 14, 16, 21, and 22) occurred as charged in the indictment. Moreover, Harbin testified that between May 1999 and January 2001, process wastewater was discharged into storm drains at least fifteen out of twenty operating days per month, and several former employees testified that pumping regularly occurred on Friday nights.

Third, Delk and McWane argue that there was insufficient evidence that they participated in a CWA conspiracy, and Delk further argues that there was insufficient evidence that he discharged any process wastewater or caused anyone else to discharge wastewater in violation of the CWA. We disagree. For example, Delk was one of two McWane employees designated as having

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[23] *See also supra* note 17.

responsibility for McWane's NPDES compliance, and witnesses testified that Delk gave orders to discharge process wastewater and once directed Harbin to falsify a water sample so that McWane could pass an inspection.

Fourth, we reject Delk's and Devine's argument that they were deprived of their due process rights to a fair trial when the district court struck three of the four objects of the CWA conspiracy from the indictment at the close of the government's case.[24] Delk and Devine primarily rely on *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998); however, that case is materially distinguishable. In *Adkinson*, four of the five objects of the conspiracy in the indictment did not state an offense under prevailing law, and the government presented evidence as to those four objects that was not relevant to the fifth object. *Adkinson*, 135 F.3d at 1372. The district court in *Adkinson* only permitted the government to present such evidence because the government assured the district court that the prevailing law would change before the end of the trial; however, the expected change in the law did not occur in time. *Id.* at 1369-70. The district court in *Adkinson* then struck the four legally impermissible objects of the conspiracy *after* the trial, but at that point, the district court had allowed into evidence "[m]ountains of details relevant only tangentially, if at all, to the ultimately charged scheme." *Id.* at 1372. As this Court observed on appeal in

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[24] Denials of motions to dismiss the indictment are reviewed for abuse of discretion, *see United States v. Waldon*, 363 F.3d 1103, 1108 (11th Cir. 2004), but underlying legal errors, including due process claims, are reviewed de novo, *see Agan v. Vaughn*, 119 F.3d 1538, 1541 (11th Cir. 1997).

Adkinson, the district court thus "obviously invited the jury to convict for conduct not, ultimately, even *alleged* to be a crime." *Id.* (emphasis added).

In contrast, the four objects of the CWA conspiracy in this case were legally proper under prevailing law, and the district court simply determined that the evidence did not support the objects that were ultimately struck. *Cf. Adkinson*, 135 F.3d at 1373 n.30 (noting that *Adkinson* was "not a case where perfectly proper charges [were] ultimately found by the court not to be supported by the evidence at trial"). Moreover, the district court stated that substantially all of the evidence relating to the stricken objects of the conspiracy also related to the CWA discharges, and defendants have failed to establish that the district court abused its discretion in that evidentiary ruling.[25]

Finally, we recognize that Devine argues that the government had to prove that Devine knew the terms of McWane's NPDES permit and knowingly violated the permit. We need not determine whether the district court should have required the government to establish that Devine knew the terms of McWane's NPDES permit. Any such error committed by the district court in this regard was harmless, because there was ample evidence presented that Devine *did* in fact know the terms of McWane's NPDES permit.

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[25] Evidentiary rulings are reviewed for an abuse of discretion. *See United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005), *cert. denied*, 546 U.S. 1169, 126 S. Ct. 1331, 164 L. Ed. 2d 47 (2006).

F. False statement in Count 24

McWane's last argument is that it is entitled to acquittal on Count 24, the false statement count. Under 18 U.S.C. § 1001, a conviction for making a false statement in a matter within the jurisdiction of the executive branch of the United States requires proof of five elements: "(1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction." *United States v. Herring*, 916 F.2d 1543, 1546 (11th Cir. 1990).

Count 24 against McWane concerns certifications that Robison signed on McWane's behalf and that McWane submitted to the EPA. There is no dispute that the statements in the certifications were material. Rather, McWane contends that the government presented insufficient evidence to satisfy elements two (falsity) and four (specific intent). Specifically, McWane contends that what Robison represented in the certifications was not false and that the government presented no evidence that Robison's certifications—as opposed to the underlying plant inspection reports prepared by other persons and submitted with the certifications—were false.

We first review the allegations in Count 24 and then explain why the record supports McWane's argument for several reasons.

First, the language of the certifications, introduced into evidence at trial, is materially different from the charge in Count 24, and thus the certifications themselves do not support that charge. Count 24 charged McWane and Robison with making a false statement to the EPA, in violation of § 1001, as follows:

> MCWANE, INC. and CHARLES "BARRY" ROBISON, the defendants, in a matter within the jurisdiction of [the EPA] . . . did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation that is, the defendants certified that documents submitted on or about August 17, 2000 and September 15, 2000, to EPA pursuant to a request under the [CWA] . . ., including "Daily . . . and Monthly . . . Inspection[ ]" forms, were "true, accurate, and complete," when in truth and fact, as defendants MCWANE and CHARLES "BARRY" ROBISON then well knew and believed, certain "Daily . . . and Monthly . . . Inspection" forms included in the submission to EPA were false.

In sum, Count 24 alleged that McWane and Robison's certifications falsely represented that the plant inspection reports submitted to the EPA "were 'true, accurate, and complete,' when in truth and fact," McWane and Robison well knew that certain of the submitted documents—plant inspection reports for January 1998 through March 2000—were false.[26]

However, McWane correctly points out that Robison, on McWane's behalf, did not certify that he *personally* knew that the attached documents—i.e., the plant inspection reports—were accurate, or even that he had *personally* reviewed the inspection reports. Rather, Robison certified only that the documents were prepared under his direction or supervision in accordance with a system designed to ensure that qualified personnel would properly gather and evaluate the documents,

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[26] We note that prior to trial, the scope of Count 24 was narrowed to encompass only the September 15, 2000 submission.

and that based on his inquiry of those persons who were responsible for gathering the documents, to the best of his knowledge, the documents were accurate. Specifically, the certifications in evidence, which Robison signed, state in full:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision, in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

In other words, Robison certified that *other qualified persons* had prepared the documents and advised him of the documents' accuracy. Because of the language in the certifications, Robison could truthfully make the representations included in the certifications even if the underlying documents included with the submissions were false.

Second, the government introduced no evidence that the plant inspection reports were prepared or gathered in a manner or a system other than that certified to by Robison. The government also presented no evidence that Robison did not inquire of the persons responsible for gathering the documents, as Robison represented in the certifications. And the government presented no evidence that upon inquiring of such persons, Robison

learned from such persons that the documents were not true or accurate. Indeed, the government acknowledged before the district court that it presented no evidence as to McWane's document-gathering "system" or Robison's "inquiries" of the persons responsible for gathering the documents. Thus, the government failed to prove that any of the statements *actually certified to* by Robison were false.

Third and most notably, McWane points out that the EPA *previously* required a certifying individual to certify that he or she had "personally examined" documents included in submissions, such as the one at issue here, but in 1983, the EPA eliminated the "personal examination" requirement. *Compare* 40 C.F.R. § 122.6(d) (1981) (requiring EPA certifications to state that "under penalty of law . . . I have personally examined and am familiar with the information submitted in this document and all attachments"), *with* 48 Fed.Reg. 39,611, 39,613 (Sept. 1, 1983) (eliminating the personal examination requirement). As such, the certifications in this case contained no representation that Robison had personally reviewed the documents in question or that he was vouching for the documents' accuracy based on his personal knowledge of the documents themselves. Rather, Robison only certified—and only had to certify—that others had prepared the documents, and that based on his inquiry of those who prepared the documents, the documents were accurate to the best of his knowledge.

The government responds that, notwithstanding the actual language of the certifications, Robison had personal knowledge of the problems at the plant, the plant inspection reports showed no problems at the plant, and therefore, Robison falsely certified that the inspection

reports were accurate. Even assuming without deciding that such offense conduct is adequately encompassed in Count 24, the government still presented no evidence that Robison ever personally reviewed the plant inspection reports or had personal knowledge of the contents of the plant inspection reports, which is needed to show that *his certifications* about the reports were false.

Certainly, the government introduced evidence that some of the plant inspection reports themselves were false. Indeed, Walsh (McWane's former safety and personnel director) testified that he was the employee who prepared the inspection reports at issue and that some of them were false. However, Walsh made clear that Robison was not among the several McWane employees who received copies of the inspection reports in the regular course of McWane's business.[27] Additionally, there were approximately 600 pages of documents attached to the certifications, and those documents included more than just the falsified inspection reports that accompanied the certifications at issue here.[28] The problem with

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[27] We stress that the government does not argue that McWane violated § 1001 by *submitting* false inspection reports to the EPA. Rather, the government concedes that under Count 24, it had to prove that the *certifications* themselves contained false statements. In other words, the government acknowledges that the false statements in the inspection reports, in and of themselves, are insufficient to sustain McWane's false statement conviction. Thus we necessarily focus on the language in the certifications.

[28] Chetan Gala, an EPA enforcement officer, testified that the post-inspection documents that McWane was required to produce (and that accompanied the certifications at issue in this case) included: (1) information about McWane's CWA permit for the plant; (2) information about entities that provided laboratory services to McWane; (3) McWane's discharge monitoring reports for a five-year period; (4) a diagram of McWane's plant; (5) McWane's "Best Management Prac-

the government's conclusory argument—that the evidence showed that Robison knew the inspection reports he submitted were false—is that Count 24 is a specific intent crime, and the government cannot point to any evidence that Robison *actually knew* the contents of the particular *inspection reports* accompanying the certifications or that Robison *actually knew* that those particular *inspection reports* contained false information.[29]

The government thus failed to establish that Robison's certified statements were knowingly false. At most, the government proved that Robison negligently submitted documents to the EPA, but that is insufficient. *See United States v. Baker*, 626 F.2d 512, 515-16 (5th Cir. 1980)[30] (stating that "in order to sustain a § 1001 conviction the government must prove that the defendant knowingly made a false statement with intent to deceive," and further stating that the specific intent requirement of § 1001 excludes "false statements made

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tices Plan," "Storm Water Pollution Prevention Plan," and "Spill Prevention Control and Countermeasure Plan," as well as the inspection reports, training records, and corrective action reports accompanying those plans; (6) the location where McWane's records were stored; (7) a schematic of the production process and related documents; (8) a description of the waste disposal system; and (9) CWA-related inspection reports by ADEM and related correspondence for a five-year period.

[29] Even Robison's contemporaneous notes fail to help the government, because the notes do not refer to any inspection reports and are not evidence that Robison had reviewed the contents of the particular inspection reports submitted to the EPA.

[30] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all Fifth Circuit decisions rendered prior to October 1, 1981.

by inadvertence, mistake, [or] carelessness") (quotation marks omitted).

Accordingly, we must conclude that McWane is entitled to a judgment of acquittal on Count 24.

III. CONCLUSION

For the foregoing reasons, defendants' convictions are reversed. The case is remanded for entry of a judgment of acquittal in favor of defendant McWane on the false statement count (Count 24). The case is remanded for a new trial as to all defendants on the CWA conspiracy count (Count 1) and for a new trial as to all defendants charged in the remaining substantive CWA counts (Counts 2, 3, 5, 7-19, 21, and 22).

REVERSED, VACATED, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-17019

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

CHARLES BARRY ROBISON, DEFENDANT

MCWANE, INC., DEFENDANT-APPELLANT

JAMES DELK, MICHAEL DEVINE, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Mar. 27, 2008

ORDER

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.*

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate

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* Judge William H. Pryor, Jr., has recused himself and did not participate.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

WILSON, Circuit Judge, dissenting from the denial of rehearing en banc, in which BARKETT, Circuit Judge, joins:

The panel in this case vacated the defendants' convictions for conspiracy and for substantive violations of the Clean Water Act ("the Act" or "CWA"), holding that the jury charge was inconsistent with the Supreme Court's intervening decision in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006). *Rapanos* was a 4-1-4 decision in which the plurality and Justice Kennedy set forth different standards for determining whether a water is within the scope of the Act. The panel held that Justice Kennedy's opinion provides the sole controlling standard, notwithstanding that the four *Rapanos* dissenters would uphold federal jurisdiction in cases where either test is satisfied.

In my view, the panel's decision cannot be reconciled with Supreme Court and Eleventh Circuit precedents addressing the proper application of fractured Supreme Court decisions. Moreover, the decision fails as a matter of common sense, as it gives no legal effect to a standard under which eight Justices would find CWA jurisdiction. This error is one of exceptional importance, implicating both the jurisdictional scope of the CWA and the interpretation of fragmented decisions generally. Accordingly, I would grant the United States' petition for rehearing en banc.

I. BACKGROUND[1]

The CWA prohibits the discharge of pollutants into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12), which are defined to mean "the waters of the United States, including the territorial seas," *id.* § 1362(7). The defendants were prosecuted for conspiracy to violate the CWA and for several substantive CWA violations arising out of the discharge of pollutants into Avondale Creek, a stream that indirectly feeds into the Black Warrior River. Relying on our decision in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), the district court instructed the jury that a "water of the United States" includes any stream—whether it flows continuously or only intermittently—that may eventually flow into a navigable stream or river. The jury returned guilty verdicts against the defendants.

Following the defendants' convictions, the Supreme Court issued its *Rapanos* decision. *Rapanos* involved two consolidated cases in which the Court construed the terms "navigable waters" and "the waters of the United States" in relation to wetlands located near ditches or drains that eventually emptied into traditional navigable waters. *See Rapanos*, 547 U.S. at 729, 126 S. Ct. at 2219 (plurality opinion). The Court remanded the cases for consideration of whether the wetlands at issue fell within the scope of CWA jurisdiction. However, the five Justices comprising the majority were divided as to the proper standard to be applied in making that determination. Writing for a four-Justice plurality, Justice Scalia

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[1] The factual background and procedural history are set forth in greater detail in the panel opinion. *See United States v. Robison*, 505 F.3d 1208, 1211-14 (11th Cir. 2007).

construed the term "the waters of the United States" to include only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739, 126 S. Ct. at 2225 (alterations in original) (citation omitted). In the plurality's view, a wetland must have a "continuous surface connection" to such a water body in order to be covered by the Act. *Id.* at 742, 126 S. Ct. at 2226.

In a separate concurrence, Justice Kennedy concluded that a different standard is applicable. According to Justice Kennedy, a water or wetland is within the scope of CWA jurisdiction if it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759, 126 S. Ct. at 2236 (Kennedy, J., concurring) (citing *Solid Waste Agency of N. Cook County v. Army Corps of Engineers*, 531 U.S. 159, 167, 172, 121 S.Ct. 675, 148 L. Ed. 2d 576 (2001)). In Justice Kennedy's view, wetlands meet this "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780, 126 S. Ct. at 2248.

Justice Stevens dissented in an opinion joined by three other Justices. The dissenters would have deferred to the Army Corps of Engineers' interpretation of the Act as encompassing the wetlands at issue. *Id.* at 788, 126 S. Ct. at 2252 (Stevens, J., dissenting). The dissent specifically noted that all four Justices who joined in the opinion would uphold CWA jurisdiction "in all other cases in which either the plurality's or Justice

Kennedy's test is satisfied." *Id.* at 810, 126 S. Ct. at 2265. The dissent further indicated that, although Justice Kennedy's standard likely would be controlling in most cases, "in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction." *Id.* at 810 n.14, 126 S. Ct. at 2265 n.14.

The defendants in this case argued on appeal that the district court's jury instruction was erroneous in light of *Rapanos* and that Avondale Creek is not a "navigable water" within the meaning of the CWA. The panel noted that there is a circuit split over which *Rapanos* opinion provides the controlling definition of that term. *United States v. Robison*, 505 F.3d 1208, 1219-20 (11th Cir. 2007). Ultimately, the panel relied on *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), for the proposition that, in determining *Rapanos's* holding, it was not free to consider the views of the Justices who dissented. *Id.* at 1221. Instead, the panel believed that it must determine "which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the 'narrowest,' i.e., the least 'far-reaching.'" *Id.* (citations omitted) (emphasis in original). The panel concluded that Justice Kennedy's "significant nexus" test fits that description because, "at least in wetlands cases such as *Rapanos*, [it] will classify a water as 'navigable' more frequently than Justice Scalia's test." *Id.* Therefore, the panel adopted Justice Kennedy's test as the governing definition of "navigable waters." *Id.* at 1222.

Applying that standard, the panel held that the jury instruction failed to comport with the "significant nexus" test and thus was erroneous. *Id.* The panel determined

that this error was not harmless because the government presented no evidence about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River. *Id.* at 1223. Accordingly, the panel vacated the defendants' convictions and remanded the case for a new trial.

The panel recognized that "[t]his case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test." *Id.* Therefore, the panel noted, "the decision as to which *Rapanos* test applies may be outcome-determinative in this case." *Id.* at 1224. Although the jury instruction was also erroneous under the plurality's test, the error "may well have been harmless" under that standard because a government witness "clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." *Id.* Nevertheless, in light of its conclusion that *Marks* required it to adopt Justice Kennedy's test, the panel determined that the harmless error analysis should be based on that standard alone. *Id.* For the same reason, the panel instructed the district court to apply Justice Kennedy's test on remand. *Id.*

II. DISCUSSION

A.

In *Marks*, the Supreme Court held: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193, 97 S. Ct. at 993 (quoting *Gregg v. Georgia*, 428 U.S. 153,

169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976) (plurality opinion)). However, the Court has recognized that the *Marks* test is "more easily stated than applied" in certain cases, and that it has "baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46, 114 S. Ct. 1921, 1926-27, 128 L. Ed. 2d 745 (1994); *see also Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337, 156 L. Ed. 2d 304 (2003) (quoting *Nichols*); *Rapanos*, 547 U.S. at 758, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (citing *Grutter*'s discussion of *Marks*). I conclude that the *Marks* framework is ill-suited as a guide to determining the holding of *Rapanos*. As the First Circuit explained in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*,—U.S.—, 128 S. Ct. 375, 169 L. Ed.2d 260 (2007), a review of *Marks* and the cases it relied upon reveals the limitations of the *Marks* rule in this context.

In *Marks*, the defendant asserted a due process challenge to his conviction for transporting obscene materials, arguing that he had been punished retroactively under a definition of obscenity established after his conduct occurred. The Court looked to a prior obscenity case, *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), to determine the state of the law at the time of the offense. In *Memoirs*, the Court reversed a state court's finding that a book was obscene and thus unprotected under the First Amendment, but the Justices in the majority offered different rationales in support of the judgment. Writing for himself and two other Justices, Justice Brennan concluded that the book would not be protected if it were deemed obscene under a correct inter-

pretation of the applicable legal standard. *Memoirs*, 383 U.S. at 418-19, 86 S. Ct. at 977 (plurality opinion). Justice Stewart concurred based on his view that the First Amendment permits suppression of hardcore pornography only. *Id.* at 421, 86 S. Ct. at 979 (Stewart, J., concurring). And Justices Black and Douglas concurred on the grounds that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. *Id.* at 421, 86 S. Ct. at 979 (Black, J., concurring); *id.* at 426, 86 S. Ct. at 981 (Douglas, J., concurring). The *Marks* Court determined that the position articulated in Justice Brennan's opinion represented the "narrowest grounds" for the judgment, and therefore that opinion constituted the holding of the Court. *Marks*, 430 U.S. at 194, 97 S. Ct. at 994.

The source of *Marks*'s "narrowest grounds" language, *Gregg v. Georgia*, was a death penalty case in which the Court considered its prior fragmented decision in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In *Furman*, five Justices agreed that the imposition of the death penalty in the cases before the Court constituted cruel and unusual punishment. However, Justice Brennan and Justice Marshall would have reached the conclusion that capital punishment is per se unconstitutional. *Id.* at 305, 92 S. Ct. at 2760 (Brennan, J., concurring); *id.* at 369-70, 92 S. Ct. at 2793 (Marshall, J., concurring). The other three Justices agreed that the statutes at issue were invalid, but left open the question whether capital punishment ever may be imposed. Among these Justices, Justice Stewart and Justice White believed that the statutes violated the Eighth Amendment because they permitted the death penalty to be imposed arbitrarily and capriciously. *Id.* at 306, 92 S. Ct. at 2760 (Stewart, J., concur-

ring); *id.* at 310-11, 92 S. Ct. at 2763 (White, J., concurring). Justice Douglas deemed the statutes unconstitutional on the grounds that they were applied disproportionately against minorities and the poor due to their discretionary aspect and the ability of wealthier defendants to obtain superior counsel. *Id.* at 255-57, 92 S. Ct. at 2734-36 (Douglas, J., concurring). In *Gregg*, it was determined that the position taken by Justices Stewart and White represented the narrowest grounds for the judgment and thus constituted the Court's holding. *Gregg*, 428 U.S. at 169 n.15, 96 S. Ct. at 2923 n.15 (plurality opinion).

As these cases indicate, the *Marks* framework makes sense only in circumstances in which one Supreme Court opinion truly is "narrower" than another—that is, where it is clear that one opinion would apply in a subset of cases encompassed by a broader opinion. In *Memoirs*, for example, the Justices taking the absolutist view of the First Amendment would always rule in favor of protecting speech, while the Justices who believed that only non-obscene speech is protected would reach the same conclusion in a subset of those cases. Similarly, in *Furman*, the Justices who believed that capital punishment is per se unconstitutional would invalidate death sentences in all future cases. The Justices who limited their decisions to the death penalty statutes before the Court would agree with that result in a subset of such cases. In each instance, the "narrower" opinion "fit entirely within a broader circle drawn by the others." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). In other words, the Justices supporting the broader position would *always* agree with the result reached by the author of the narrower opinion in cases where the latter's test was satisfied.

Several of our sister circuits have recognized this limitation on *Marks*'s scope. *See, e.g.*, *Johnson*, 467 F.3d at 64 ("[T]he 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other. When applied to future cases, the less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would."); *King*, 950 F.2d at 781 ("*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions."); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir.) (same), *cert. denied*,—U.S.—, 127 S. Ct. 692, 166 L. Ed. 2d 536 (2006); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (same); *see also Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994) (finding that concurring opinion provided controlling rule under *Marks* because that opinion "set forth as its standard a coherent subset of the principles articulated in the plurality opinion").

B.

Neither the *Rapanos* plurality's nor Justice Kennedy's test is a subset of the other. The two tests simply set forth different criteria for determining whether a water is within the scope of the CWA. Unlike the Justices in *Memoirs* and *Furman*, neither the plurality nor Justice Kennedy necessarily would agree with the outcome reached by the other in any given case. In many instances, Justice Kennedy's test would result in a finding of CWA jurisdiction where the plurality's test would not. In others, however, the plurality would find jurisdiction even if Justice Kennedy reached the opposite

conclusion. *See Johnson*, 467 F.3d at 64 (noting that *Rapanos* plurality would find jurisdiction in cases involving small surface water connection to stream or brook, but Justice Kennedy might not find significant nexus); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (same), *cert. denied*,—U.S.—, 128 S.Ct. 45, 169 L. Ed. 2d 12 (2007). The present case may fall within this latter category. As the panel recognized, the record here arguably establishes CWA jurisdiction under the plurality's test but not Justice Kennedy's. *Robison*, 505 F.3d at 1223. It thus is difficult to understand how either test can be characterized as "narrower" than the other, at least as that term is understood in *Marks*.

Nevertheless, the panel concluded that Justice Kennedy's test is narrower than the plurality's because, "at least in wetlands cases such as *Rapanos*, [it] will classify a water as 'navigable' more frequently." *Id.* at 1221. The panel based this conclusion on the fact that Justice Kennedy rejected two "limitations" imposed by the plurality's test: "the requirement that 'navigable waters' must be 'relatively permanent, standing or flowing bodies of water' and the requirement of a 'continuous surface connection.'" *Id.* at 1221-22 (citations omitted). However, Justice Kennedy's test imposes a limitation that is absent under the plurality's test: the showing of a "significant nexus" between the water at issue and "waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759, 126 S. Ct. at 2236 (Kennedy, J., concurring). Furthermore, Justice Kennedy rejected the plurality's test in part because he deemed it overinclusive in certain respects. *See id.* at 769, 126 S. Ct. at 2242 (Kennedy, J., concurring) (stating that, under plurality's test, "[t]he merest

trickle, if continuous, would count as a 'water' subject to federal regulation"); *id.* at 776-77, 126 S. Ct. at 2246 ("[B]y saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."). Thus, Justice Kennedy's test is not uniformly narrower than the plurality's, and Justice Kennedy did not regard it as such.

Moreover, the *Marks* rule does not turn on the frequency with which a given test will be satisfied. Under *Marks*, the "narrowest" ground is that which reflects a common denominator implicitly supported by the Justices concurring in the judgment. *See King*, 950 F.2d at 781. As discussed, there is no such common denominator in *Rapanos*. Thus, however frequently it may result in CWA jurisdiction, Justice Kennedy's test is not "narrower" than the plurality's approach for purposes of *Marks*; it is a different standard altogether.

For these reasons, I agree with the First Circuit that *Marks* provides little, if any, guidance as to the proper interpretation of *Rapanos*. *See Johnson*, 467 F.3d at 64 (noting "the shortcomings of the *Marks* formulation in applying *Rapanos*"); *see also Carrizales-Toledo*, 454 F.3d at 1151 ("We do not apply *Marks* when the various opinions supporting the Court's decision are mutually exclusive."). The panel acknowledged these limitations, *see Robison*, 505 F.3d at 1221 n.14 (noting that "*Marks* does not 'translate easily' to *Rapanos*") (quoting *Johnson*, 467 F.3d at 64), but nonetheless concluded that *Marks* barred it from considering the views of the dissenting Justices in identifying *Rapanos*'s holding. As

discussed below, however, that conclusion is inconsistent with later Supreme Court and Circuit precedents approving the consideration of such views in circumstances similar to those involved here.

C.

In considering its own prior fragmented decisions, the Supreme Court has frequently analyzed dissents in combination with other opinions to identify the legal principles that have the support of a majority of the Justices. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594, 2607, 165 L. Ed. 2d 609 (2006) (citing concurring and dissenting opinions to establish majority support for legal proposition); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17, 103 S. Ct. 927, 937, 74 L. Ed. 2d 765 (1983) (finding that four dissenting Justices and concurring Justice formed majority to reaffirm controlling legal standard); *see also Waters v. Churchill*, 511 U.S. 661, 685-86, 114 S. Ct. 1878, 1893, 128 L. Ed. 2d 686 (1994) (Souter, J., concurring) (analyzing plurality, concurring, and dissenting opinions to identify legal test to be applied by lower courts); *Alexander v. Sandoval*, 532 U.S. 275, 281-82, 121 S. Ct. 1511, 1517, 149 L. Ed. 2d 517 (2001) (noting agreement between Justice who joined plurality and four dissenters). In the panel's view, however, the authority to consider dissenting opinions is confined to the Supreme Court. Lower courts, the panel believed, "do not have that luxury." *Robison*, 505 F.3d at 1221.

However, the Supreme Court has expressly approved the consideration of dissenting Justices' views by a court of appeals. In *Moses H. Cone* (a post-*Marks* case), the

petitioner argued that the *Colorado River* test[2] governing the entry of a stay of federal court proceedings had been overruled by a subsequent case, *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L. Ed. 2d 504 (1978). The Court rejected this argument, noting that the opinion announcing the judgment in *Will* garnered the support of only four Justices. Justice Blackmun provided the fifth vote for reversal but agreed with the dissenters that the *Colorado River* test was controlling. Thus, the Court in *Moses H. Cone* noted: "On remand, the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test." 460 U.S. at 17, 103 S. Ct. at 937.

We have followed the same approach in interpreting fractured Supreme Court decisions. For example, in *Martin v. Dugger*, 891 F.2d 807 (11th Cir. 1989), *overruling on other grounds recognized in Johnson v. Singletary*, 991 F.2d 663, 667 (11th Cir. 1993) (per curiam), we held that the district court had improperly relied on the plurality view in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), to determine the showing necessary for a court to consider the merits of a successive habeas petition. Instead, we looked to both the plurality opinion and the dissenting opinions in *Kuhlmann* to ascertain the legal principle agreed upon by a majority of the Court. *See Martin*, 891 F.2d at 808-09 & n.2. After analyzing these various opinions, we concluded:

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[2] *See Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

> Thus, a majority of the court agrees that a showing of innocence is a factor that may be appropriately considered. Although in *Kuhlmann* the premise that factual innocence is one of the grounds to be considered commands a "majority" only by grouping justices who disagree as to the result, nonetheless we believe this situation is sufficiently analogous to that of . . . *Marks v. United States* to warrant deference to the common ground among members of the fragmented Court. This is especially true as the three dissenting justices made explicit their agreement with the more limited premise (that factual innocence was one of the factors to consider), which was encompassed by the position of the four justice plurality.

Id. at 809 n.2 (citations omitted).

As in *Kuhlmann*, the dissenters in *Rapanos* explicitly stated their agreement with the narrower premises advocated by the Justices supporting the judgment. That is, they agreed that waters described by either the plurality's or Justice Kennedy's test are within the scope of CWA jurisdiction. *See Rapanos*, 547 U.S. at 810, 126 S. Ct. at 2265 (Stevens, J., dissenting). We thus do not need to speculate whether these Justices would find jurisdiction in this case if the record indicates that the plurality's test has been satisfied. They have stated unequivocally that they would do so.

Our decision in *McCullough v. Singletary*, 967 F.2d 530 (11th Cir. 1992), likewise took dissenting opinions into account as part of its analysis. In *McCullough*, we agreed with the Fifth Circuit's interpretation of *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), a fractured decision involving a defen-

dant's Eighth Amendment challenge to his sentence on grounds of proportionality. *See McCullough*, 967 F.2d at 535 (citing *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992)). The Fifth Circuit "appl[ied] a head-count analysis" of Harmelin—one that included consideration of the views of the four dissenting Justices—and concluded that "seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences." *McGruder*, 954 F.2d at 316.

In light of this authority, I believe that the panel erred in basing its harmless error analysis exclusively on Justice Kennedy's test. The panel also should have considered whether the district court's erroneous jury instruction was harmless under the plurality's test. This "simple and pragmatic" approach, *Johnson*, 467 F.3d at 64, would have given recognition to the indisputable fact that there is majority support among the Justices for both the plurality's and Justice Kennedy's tests. Moreover, it might have avoided the bizarre outcome created by the panel decision: that this case has been remanded for a new trial even though, as the panel acknowledges, the current record may well establish jurisdiction under the plurality's test, which eight Justices agree encompasses waters covered by the Act. Had the panel concluded that the instructional error was not harmless under the plurality's test, it should have instructed the district court that the government may prove jurisdiction on remand under either the plurality's or Justice Kennedy's test. *See Rapanos*, 547 U.S. at 810 n.14, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting).

D.

The panel's error, I believe, is of sufficient magnitude as to warrant en banc consideration. Review by the full court is appropriate where a panel decision constitutes a "precedent-setting error of exceptional importance" and is "in direct conflict with precedent of the Supreme Court or of this circuit." 11th Cir. R. 35-3. For the reasons discussed above, I conclude that the panel's decision conflicts with the Supreme Court's decision in *Moses H. Cone* and with our decisions in *Martin* and *McCullough*. The exceptional importance of this error is apparent in view of the geography of the states in the Eleventh Circuit and the frequency with which CWA cases are likely to arise in this Circuit in the future. The large number of water bodies and wetlands in the region, coupled with the significant pace of development, suggests that later disputes over the scope of federal authority under the Act may occur with some regularity.[3]

An additional consideration supporting en banc review is the fact that the panel's opinion goes farther than the other circuit court decisions that have found Justice Kennedy's test to be the applicable *Rapanos* standard. No other circuit has held that the plurality's test is *never* applicable, even where, as here, that test may result in a finding of jurisdiction. Thus, the Ninth Circuit amended its original opinion in *Northern California River Watch v. City of Healdsburg* to note that Justice Kennedy's concurrence provided "the controlling

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[3] The United States notes in its petition for rehearing en banc that many tributaries in this Circuit flow year-round and thus would readily satisfy the plurality's test.

rule of law for our case" and that it is "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*." 496 F.3d 993, 999-1000 (9th Cir. 2007) (emphasis added), *cert. denied*,—U.S.—, 128 S. Ct. 1225, 170 L. Ed. 2d 61 (2008).[4] The Seventh Circuit in *Gerke* held that Justice Kennedy's test "must govern the further stages of this litigation," 464 F.3d at 725, but did not hold that his test applies in all cases. In fact, the court arguably suggested to the contrary. *See id.* (noting that in a case involving a slight hydrological connection, Justice Kennedy might vote against a finding of jurisdiction "only to be outvoted 8-to-1."). Thus, the panel's decision not only conflicts with the First Circuit's ruling in *Johnson;* it also announces a more sweeping interpretation of *Rapanos* than that adopted by any other circuit.

Finally, I note that the reach of the panel's decision will not be confined to CWA cases. The decision will have relevance across a range of future cases involving the interpretation of a fractured Supreme Court decision. To ensure that our case law conforms to the Court's teachings on that issue and provides consistent guidance to courts in this Circuit, en banc review would have been proper in this case.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

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[4] The court's initial opinion discussed *Rapanos* in more categorical terms. *See N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) ("Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law.").

APPENDIX C

1. 33 U.S.C. Section 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. 33 U.S.C. Section 1319 provides in pertinent part:

Enforcement

(c) Criminal penalties

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

* * * * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. * * *

3. 33 U.S.C. Section 1362 provides in pertinent part:

Definitions

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

4. 33 C.F.R. Section 328.3 provides:

Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

5. 40 C.F.R. Section 230.3(s) provides:

Definitions

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Supreme Court, U.S.
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No. 08-223

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MCWANE, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant review to provide guidance to lower courts on how to apply the fragmented ruling in *Rapanos v. United States*, 547 U.S. 715, 767 (2006), to alleged violations of the Clean Water Act, where the government's proposed guidance would not alter the outcome in this case and would rarely if ever affect the Act's reach.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The United States of America is the petitioner in this Court. The United States brought this prosecution in the district court and was the appellee and cross-appellant in the court of appeals.

The following parties are respondents and cross-petitioners in this Court: McWane, Inc.; James Delk; and Michael Devine. All respondents were defendants in the district court. Respondent McWane, Inc., was an appellant in the court of appeals. Respondents Delk and Devine were appellants and cross-appellees. Charles Barry Robison was a defendant in the district court. He is not, however, a respondent or cross-petitioner in this Court pursuant to Supreme Court Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that McWane, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The court of appeals denied petitions for rehearing on March 27, 2008. Pet. App. 42a–59a. On June 14, and again on July 18, Justice Thomas extended the time within which to file the petition for a writ of certiorari, eventually up to and including August 22, 2008. The petition for a writ of certiorari was filed on August 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The government seeks review of a question that, even if answered in its favor, would not affect the outcome of this or possibly any other case. Even the government concedes that the court of appeals' interpretation of this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), will *not* alter the outcome of a prosecution or civil enforcement action in the "vast majority" of cases. Pet. 28. In fact, no court of appeals in the two years since *Rapanos* has concluded that the interpretation urged by the government would alter the outcome on the facts before it. The government is therefore left to argue that the result it seeks would make for a "substantially more efficient and straightforward" enforcement scheme. Pet. 28. Whatever the merits of that assertion, the

agencies responsible for enforcement of the Clean Water Act have both the power and the duty to seek such a result in the first instance through regulations that—at long last—comply with the law. Until those agencies have promulgated such rules, it is premature for this Court to return to an issue that recently failed to produce an opinion joined by a majority of its Members.

1. Respondents are McWane, Inc., James Delk, and Michael Devine. McWane manufactures cast iron piping, flanges, valves, and fire hydrants. Pet. App. 1a–2a, 7a. This case concerns its plant in Birmingham, Alabama. *Id.* at 2a. Mr. Delk was General Manager of the plant; Mr. Devine was Plant Manager. *Id.* at 3a.

On July 28, 2004, the government filed a superseding indictment charging respondents and others with violations of the Clean Water Act ("CWA") and related offenses. The CWA prohibits the discharge of pollutants into "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), 1311(a), 1362(12)(A). All of the counts concerned the alleged discharge of process wastewater from the plant into Avondale Creek between May 1999 and January 2001.

Avondale Creek is a shallow, non-navigable creek that runs through and underneath downtown Birmingham and eventually flows next to the plant. Over the years, it has been moved for drainage purposes, channelized and substantially straightened; parts of it run in underground pipes. Trial Tr. 4403; DX 1036 (aerial photograph showing straightened

portions of Avondale Creek as part of a solid yellow line and underground portions as a dotted yellow line) (App. 1a). As the court of appeals explained, at the point where it meets the McWane plant, the creek is more than forty-five miles from the Black Warrior River, the nearest navigable-in-fact waterway. Pet. App. 3a–4a. Avondale Creek flows into Village Creek, which flows twenty-eight miles to a dam that runs "'all the way across Village Creek[,]'" Pet. App. 4a, forming Bayview Lake, which leads—after a waterfall—to Locust Fork, flowing another twenty miles to the Black Warrior River. *Id.*; Trial Tr. 186. The government's position at trial was that the Black Warrior River was the only navigable-in-fact waterway at issue.

2. More than six months before trial, respondents and the other defendants jointly moved to dismiss the CWA counts on the ground that Avondale Creek—the sole point of discharge alleged in the superseding indictment—was not a "navigable water" within the scope of the Act. Emphasizing this Court's holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), respondents argued that the CWA does not apply to non-navigable waters, like Avondale Creek, unless they have a "significant nexus" to waters that are navigable-in-fact. Respondents explained that Avondale Creek bore no such nexus to the Black Warrior River, the closest navigable-in-fact waterway.

In response, the government urged the district court to ignore *SWANCC* as "irrelevant to the law governing Avondale Creek[.]" Dist. Ct. Docket Entry ("DE") 148, at 29 (capitalization of argument heading

altered). The government argued that the court should instead proceed based on the incorrect assumption that Avondale Creek would be within the reach of the CWA simply by virtue of its remote and indirect connection to the Black Warrior River, irrespective of whether the creek had any effect on the river. In particular, the government mistakenly argued that "tributaries" that eventually "flow into a navigable water are covered under the CWA regardless of size, distance, continuity or nature." *Id.* at 24.

On March 3, 2005, the district court denied respondents' motion to dismiss. Without definitively ruling on the level of proof that would be required at trial, the district court reasoned that it was possible that the government could present evidence sufficient to satisfy the jurisdictional element of the CWA counts.

3. Respondents stood trial for six weeks, during which eighty witnesses testified and thousands of pages of exhibits were received into evidence. Despite respondents' arguments on the proper standard for proving the jurisdictional element of the CWA claims, the government failed to offer *any* evidence of a significant nexus between Avondale Creek and the Black Warrior River. Pet. App. 10a–11a, 19a–20a.

At the close of the government's case, respondents and the other defendants filed a joint motion for judgment of acquittal. DE 331. Among other things, they again argued that the government failed to present evidence sufficient for a reasonable jury to find that the discharges in question were into navigable waters. *Id.* at 9 n.7. The court rejected that claim as to respondent McWane and reserved ruling

as to the other respondents. Trial Tr. 3484; Minute Entry (dated May 23, 2005). On July 15, 2005, the defendants renewed their motion for a judgment of acquittal, raising this argument yet again. DE 387, at 1 n.2.

The district court denied the renewed motion, DE 417, crediting the government's erroneous view that it could satisfy its burden with nothing more than proof that Avondale Creek, though in places little more than a shallow straight-lined drainage ditch, was indirectly, remotely, and intermittently connected to a navigable-in-fact waterway. Consistent with this ruling, the court instructed the jury that "navigable waters" include any stream that "may eventually flow directly or indirectly into a navigable stream or river" and that such stream may be "*manmade*" and flow "*only intermittently*." Pet. App. 11a (quoting jury instruction; emphasis in opinion). On June 10, 2005, the jury returned guilty verdicts on all but three of the CWA charges as well as on other related counts. Pet. App. 9a. The district court rejected the government's insistence on substantial terms of imprisonment, and it instead ordered heavy fines, a period of home confinement and other conditions of probation.[1]

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[1] The court explained that there had been no proof of financial greed or harm to any person or property. Sent. Hr'g Tr. 239–40 (Dec. 5, 2005). The trial judge added that he "just can't see it being reasonable to cause any of these three men to be incarcerated." *Id.* at 245; *see also id.* ("I feel strongly enough about it that if there is an appeal . . . I had rather see my judgment with regard to the conviction be reversed, than to see the

[Footnote continued on next page]

4. Respondents appealed their convictions, and the government cross-appealed respondents' sentences. Citing *SWANCC* and *Rapanos*, respondents again argued that the government failed to present evidence sufficient to prove a "significant nexus" between Avondale Creek and the Black Warrior River. Respondents emphasized that this failure entitled them to judgments of acquittal. They also argued, in the alternative, that the erroneous jury instruction on the definition of navigable waters required reversal.

The court of appeals reversed respondents' convictions. The court agreed that the government had relied on—and successfully urged the use of—an overly broad definition of navigable waters. In particular, it "join[ed] the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*" for determining which waters are within the jurisdiction of the CWA. Pet. App. 23a. And it reversed based on the defective instruction the government had urged. *Id.* at 26a.

The court of appeals held that the error was not harmless because "[t]he government did not present any evidence, through [its expert] or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was no evidence presented

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[Footnote continued from previous page]
sentence that I imposed be reversed. I feel that strongly about it.").

of any actual harm suffered by the Black Warrior River." *Id.* at 27a.[2] In fact, the court of appeals concluded that the government failed *even to investigate* the possibility of a significant nexus:

> On cross-examination, [government expert Fritz] Wagoner admitted that he did not conduct a "tracer test" to check the flow of Avondale Creek into the Black Warrior River. . . . Wagoner conducted no tests to measure the volume of water discharged from Avondale Creek or between the bodies of water that connect Avondale Creek and the Black Warrior River. He conceded that the water level in Avondale Creek was so low that he was able to walk through Avondale Creek all the way down to its intersection with Village Creek.

Id. at 4a.

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[2] The petition attempts to divert attention from this fact by referring to large quantities of "contaminant-laden wastewater," (Pet. 6) including hydraulic oil, that turned the water "white with pollution from bank to bank." *Id.* at 8. The jury, of course, was never asked to find whether any of this hyperbole was remotely true. And the government conveniently fails to mention that the oil that turned process wastewater milky white in color was as much as 99% water and 1% water-soluble oil, that this oil is highly visible in water, and that "white" process wastewater could be within permit limits for oil and grease. Trial Tr. 1247–48, 1330–31, 1609–10; GX 56, 114, 150 & 155. Finally, of course, the government presented no evidence that any of this discharged water ever reached the Black Warrior River.

Although the court of appeals agreed with respondents that the government's expert on the navigable waters element "did not testify as to *any* 'significant nexus' between Avondale Creek and the Black Warrior River," Pet. App. 27a (emphasis added), the court declined to address respondents' argument that they were entitled to judgments of acquittal due to the insufficiency of the proofs on that essential element. Relying on *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996),[3] the court of appeals concluded that a new trial was allowed because the insufficiency of the evidence was accompanied by trial error—here, the overly broad navigable waters jury instruction that the government had successfully advocated—and, as a result, the government supposedly lacked "any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's 'significant nexus' test." Pet. App. 32a. Thus, having intentionally failed to present, or even develop, evidence of a significant nexus between Avondale Creek and the Black Warrior River—and having done so in defiance of then-existing controlling authority (*i.e.*, *SWANCC*) and in the teeth of respondents' repeated objections—the government would be free to subject respondents to a second trial based on evidence that it will need to create in order to hypothesize about the flow conditions that might or might not have existed between Avondale Creek and the distant Black Warrior River more than seven years ago.

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[3] This Court abrogated *Sanchez-Corcino*'s ruling on an unrelated issue in *Bryan v. United States*, 524 U.S. 184 (1998).

5. Respondents and the government both petitioned the court of appeals for rehearing. The government argued that the court should reconsider its interpretation of *Rapanos* and sustain respondents' convictions. Respondents argued that the court's interpretation of the Double Jeopardy Clause was inconsistent with *Burks v. United States*, 437 U.S. 1 (1978), and its progeny, and that the court should remand, instead, for entry of judgments of acquittal. The court of appeals denied rehearing on both issues, with two judges dissenting. Pet. App. 42a–59a.

REASONS FOR DENYING THE PETITION

Since the events that formed the basis for this prosecution, a majority of the Court has twice rejected the jurisdictional theory on which the government relied. In *Rapanos*, the Chief Justice explained that five years earlier—well before trial in the instant case—the Court had declined to credit the government's "view that its authority" under the CWA "was essentially limitless." 547 U.S. at 757 (citing *SWANCC*, 531 U.S. at 171). The government's failure to "refin[e] its view of its authority in light of . . . *SWANCC*" led to a second defeat in *Rapanos*. 547 U.S. at 758.

In this case, after losing on the issue yet again, the government argues that eight Members of the Court in *Rapanos* (the four Justices in the plurality plus the four dissenters) defined "navigable waters" under the CWA to include a channelized and straightened shallow urban creek located *more than forty-five miles* from the nearest navigable-in-fact waterway. It is necessary for the government to prevail on its argument that the plurality opinion interprets the CWA in such an expansive manner in order

for it to avoid the same outcome as below—reversal of respondents' convictions.

But the government's view of the plurality opinion in *Rapanos* is mistaken. Because respondents' convictions must be reversed regardless of whether the plurality rule may be invoked, this case would not give the Court occasion to decide whether the government may ever rely on the plurality rule to prosecute under the CWA. And even if these tests *could* lead to different results in this case, review would affect very few other cases, if any at all. All or nearly all waters that satisfy the plurality rule would meet Justice Kennedy's significant nexus test as well. Even the government concedes this point. Pet. 28. Since review cannot lead to a different result in this case, and would in any event have such an effect in few other cases, the petition should be denied.

Unable to show that review would affect the outcome of a material number of cases, the government complains that the result below will make it more inconvenient to prove that a discharge is covered by the Act. But this inconvenience is entirely the making of those agencies charged with implementing the CWA—the Environmental Protection Agency and the Army Corps of Engineers. They have the ability to simplify the application of the Act by promulgating new rules that are consistent with the Act and this Court's precedent. They have not even attempted to do so. For this reason alone, review of the government's question presented is premature at best.

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLVING A CIRCUIT CONFLICT BECAUSE THE RULINGS ON BOTH SIDES OF THE CONFLICT SUPPORT THE OUTCOME BELOW

The CWA extends only to "navigable waters," which it defines as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), 1311(a), 1362(12)(A). The Court most recently construed the scope of the CWA in *Rapanos*, 547 U.S. 715 (2006). No opinion in that case commanded a majority of the Court. *Rapanos* produced five separate opinions, none of which was joined by more than four Justices. Those opinions set forth three different tests for determining the scope of the Act. The government correctly observes that a circuit conflict has begun to develop after *Rapanos* over how to apply that decision. Pet. 16. Contrary to the government's contention, however, this case would be a poor vehicle for trying to resolve that conflict.

1. The government's erroneous view that a circuit conflict could be resolved here arises from its overly expansive and self-serving interpretation of the four-Justice plurality opinion authored by Justice Scalia. 547 U.S. at 719–57. As the government construes the plurality opinion, it would extend coverage of the CWA to a *broader* category of tributaries than the "significant nexus" standard set forth in Justice Kennedy's concurring opinion and applied by the court of appeals. *But see* 547 U.S. at 756–57 (plurality opinion) (criticizing Justice Kennedy's approach because it would disallow only some, rather than all, of the government's "excesses"). Thus, the government claims that the Eleventh Circuit would have reached a different outcome here—affirming the convictions—had it applied the plurality test instead.

Pet. 16. The government is wrong. The plurality rule, like Justice Kennedy's rule, compels the reversal of respondents' convictions.

a. Justice Scalia's plurality opinion addressed both "wetlands" and "tributaries." With respect to wetlands, the plurality focused on the textual problem that *lands* are not *waters*: "The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734.[4] In concluding that wetlands that are remote from covered waters are *not* within the CWA's reach, the plurality contrasted remote wetlands to those that are *adjacent* to water. *Id.* at 742. It reasoned that the CWA applies to wetlands when they cannot be readily distinguished from *abutting* covered waters. Therefore, on the plurality's view, establishing that wetlands are within the Act's coverage requires two findings:

> First, that the *adjacent* channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection

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[4] *See also Rapanos*, 547 U.S. at 731 ("[T]he CWA authorizes federal jurisdiction only over 'waters.'" (quoting 33 U.S.C. § 1362(7)); *id.* at 734 ("That limited effect includes, at bare minimum, the ordinary presence of water."); *id.* at 738 ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land . . . ."); *id.* at 739 n.9 (criticizing Justice Kennedy's concurring opinion because it allows the CWA to interfere with "traditional state land-use regulation.").

> with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Id. (emphasis added; alteration in original).

The plurality disclaimed any intention to set forth a test, such as the one urged by the government, that addresses every requirement for *all waters* covered by the Act. *Id.* at 731. It did, however, address the government's expansive definition of "tributaries" (*id.* at 725–28) and describe the *minimum* characteristics of the waters that are within the Act's coverage in the course of its wetland analysis: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739 (emphasis added; ellipses and alterations in original) (quoting Webster's Second 2882). By clarifying that these are the "only" covered waters, the plurality made clear that temporary waters, manmade ditches and drains (which were the "tributaries" on which the government relied in *Rapanos, see id.* at 729) are not covered. But the plurality did not conclude that all waters meeting its description are necessarily covered. In fact, the plurality expressly clarified that "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 736 n.7 (emphases in original).

b. The government now mistakenly argues the opposite view: that the plurality rule would allow it to prosecute any discharge into *any* relatively permanent water merely because it is possible to trace its surface flow, however slight, from the point of discharge through a limitless number of other non-

navigable waters, to a remote body of water that *is* navigable-in-fact. In particular, the government argues that the plurality's test would permit federal prosecution of any discharge into Avondale Creek based on evidence that this channelized, urban creek flowed "year-round" (or even if it flowed only seasonally) so long as it "ultimately fed into a traditional navigable water," irrespective of the distance or the number of barriers or other non-navigable water bodies between the two. Pet. 27.

The plurality squarely rejected this boundless knee-bone's-connected-to-the-thigh-bone approach to the definition of navigable waters. First, the plurality explained, the Act's reference to "the waters" precludes the notion that it covers *all* waters: "The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general." *Rapanos*, 547 U.S. at 732. Then, the plurality approvingly explained that "the lower courts do not generally rely on characterization of intervening channels as 'waters of the United States' in applying" the CWA's prohibition of unauthorized discharges. *Id.* at 745. Rather, "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the Act], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* at 743 (emphasis in original) (citing *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005)). It is the fact that pollutants in those cases naturally made their way from a point source to a navigable-in-fact water that triggered the Act's pro-

visions.[5] This reasoning demonstrates that waters downstream are *not* covered simply because they are downstream.[6]

c. Contrary to the government's relentlessly expansive position, the touchstone of the plurality rule is physical proximity between a point of discharge and navigable-in-fact water. *See, e.g.*, *Rapanos*, 547 U.S. at 742 ("*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act") (emphasis in original), 748 ("'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby'") & 755 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable*

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[5] For this reason, the plurality would recognize jurisdiction over discharges if the government had "prove[d] that the contaminant-laden waters ultimately reach[ed] covered waters." *Rapanos*, 547 U.S. at 745. As the court of appeals correctly explained, however, the government presented absolutely "no evidence" of the "effect that Avondale Creek's waters had or might have had on the Black Warrior River," Pet. App. 4a, much less evidence of the effect that the discharges themselves had on that navigable water. "Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River." *Id.*

[6] Indeed, the plurality specifically concluded that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not covered simply because of their connection. *Id.* at 742.

from waters of the United States") (emphasis in original).

The plurality's analysis of the "tributaries" that had carried the discharges to the wetlands in *Rapanos*, and of the lower court cases that had accepted the government's expansive view of tributaries, leave no doubt that the reading now advanced by the government is untenable. The plurality's repeated references to "adjacency" clearly conveyed that tributaries must be physically proximate to a navigable-in-fact waterway to be covered by the Act without further inquiry, and that discharges into more remote waters are not covered by the Act unless the government affirmatively proves that any pollutants discharged in them actually reached a navigable waterway. *Id.* at 742–45.

In fact, the government is now back in Court ascribing to the plurality—incredibly—the type of "expansive definition of tributaries" that the plurality was not content merely to reject, but that it also, and with great effect, lampooned. Indeed, some of the lower court decisions that the plurality expressly rejected as inconsistent with *SWANCC* involved tributaries that were *less* remote than those involved in this case. *See* 547 U.S. at 725–26. Of particular relevance here, the plurality ridiculed the government's "sweeping assertions of jurisdiction" over a tributary in *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), which the plurality described as "a 'roadside ditch' whose water took 'a winding, thirty-two-mile path to the Chesapeake Bay[.]'" *Id.* at 726–27. It strains credulity to think the plurality would uphold federal jurisdiction over the conduct prosecuted here—discharges into a shallow, channelized creek separated from the Black Warrior River by more

than forty-five miles, two additional intrastate tributaries, a dam, and a waterfall—where in *Deaton* there was a continuous path of tributaries from the ditch on the defendant's property to a navigable water (the Wicomico River) just *eight* miles away. 332 F.3d at 702 (further noting that "the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water").

Notably, the other side of the circuit split that brought *Rapanos* to this Court was a Fifth Circuit case rejecting *Deaton*. The Fifth Circuit had concluded that the government's expansive definition of tributaries was "unsustainable under *SWANCC*," and had held that a body of water is subject to federal regulation only if it is "actually navigable or *adjacent* to an open body of navigable water." *United States v. Needham (In re Needham)*, 354 F.3d 340, 345–46 (5th Cir. 2003) (citation and internal quotation marks omitted; emphasis added); *see also id.* at 347 ("[T]he term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway.").

Thus, as *Rapanos* came to this Court, one side of the circuit split held that, under *SWANCC*, waters that were not navigable-in-fact could be covered by the CWA only if they were adjacent to a navigable-in-fact waterway; the other side of the split had been persuaded by the government to disregard *SWANCC* to hold that "tributaries," "wetlands," and even a patch of desert were covered by the CWA if the government could point to some "hydrological connection" to a navigable-in-fact waterway. Although even

a casual reader of the opinions that supported the judgment in *Rapanos* would conclude that the five Justices in the majority rejected the government's "hydrological connection" test, the government now imaginatively contends that the four Justices in the plurality actually *accepted* that test, but merely qualified it slightly to require a "surface" hydrological connection.

d. The plurality also stressed Congress' intent "to recognize, preserve, and protect the primary responsibilities and rights of States" to control pollution and "'plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" 547 U.S. at 722–23 (quoting the CWA). The government's theory of the CWA—which embraces every purely intrastate, "relatively permanent," not-navigable-in-fact tributary that is eventually connected to a navigable water through a potentially limitless number of like intrastate tributaries—is precisely the type of "expansive interpretation" that the plurality condemned because it "would 'result in a significant impingement of the States' traditional and primary power over land and water use.'" *Id.* at 737–38 (quoting *SWANCC*, 531 U.S. at 174).

It should come as no surprise that careful maintenance of this balance between federal and state authority is utterly inconsistent with the government's position. This Court came to that conclusion before *Rapanos*. It had previously recognized that "Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 171 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S.

121, 133 (1985); internal quotations marks omitted). But in *SWANCC* the Court rejected the government's largely unbounded view of "what those waters might be," noting "it is also plausible, as petitioner contends, that Congress simply wanted to include all waters *adjacent* to 'navigable waters,' such as non-navigable tributaries and streams." 531 U.S. at 171 (emphasis added). The *Rapanos* plurality did not silently reverse course and validate the government's position that there need only be *some* surface connection, however remote and indirect, between a tributary and an impossibly distant navigable waterway.

e. There is yet another reason why the government's proof did not remotely meet the requirements set forth by the *Rapanos* plurality. The government failed to prove that Avondale Creek is "a relatively permanent body of water connected to traditional *interstate* navigable waters." *Rapanos*, 547 U.S. at 742 (emphasis added).

As the plurality noted, the Act requires proof of a discharge into waters "*of the United States*." *Id.* at 731 n.3 (emphasis added). That "qualifier excludes intrastate waters, whether navigable or not." *Id.* Here, even if the Black Warrior River is navigable-in-fact, the government failed to prove, and—because the government successfully imposed its boundless view at trial—the jury never was asked to decide, that it is an *interstate* waterway. In fact, publicly available data from the United States Geological

Service show that the government could not have proven such a thing, even had it tried.[7]

f. So despite the government's conclusory assertions to the contrary, Avondale Creek is *outside* the coverage of the CWA according to the plurality rule, as well as Justice Kennedy's rule. Avondale Creek may be relatively permanent, and it might even have a remote hydrologic connection to a navigable-in-fact waterway—although the jury certainly never reached either conclusion. But Avondale Creek is not proximate to navigable-in-fact waters; it is over forty-five miles from the Black Warrior River. The two are separated by two other creeks, a lake, a waterfall, and a dam. Pet. App. 3a. There is no evidence that waters from Avondale Creek—much less any watery discharge therein—ever reached the Black Warrior River, much less that they reached a navigable-in-fact interstate waterway. *Id.* at 4a.

2. Perhaps recognizing the requirement of physical proximity, the government belatedly attempts to halve the distance between navigable-in-fact waters and Avondale Creek. If the government was consistent on one point before, during and after trial, it was the theory that discharges of pollutants into Avondale Creek violated the Clean Water Act

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[7] *See, e.g.*, USGS, Feature Detail Report on the Black Warrior River (available at http://geonames.usgs.gov/pls/gnispublic/f?p=117:3:13481099116477521520::NO::P3_FID:159191) (documenting that the Black Warrior River begins and ends in Alabama and traverses six counties, all of which are in Alabama); State of Alabama, United States Department of Interior Geological Survey Map (available at https://store.usgs.gov/yimages/PDF/37931.pdf).

because there is an indirect connection between Avondale Creek and the distant *Black Warrior River*. For the first time on appeal, after the *Rapanos* decision, the government belatedly attempted to switch streams, arguing that the discharges violated the CWA because a small portion at the end of the body of water into which Avondale Creek flows—Village Creek—allegedly is navigable-in-fact. Even on its assumption that this tactic is permissible, the government nonetheless concedes that Avondale Creek would be a distant "26.7 miles downstream" from the supposedly "navigable" waters. Pet. 8–9.

But this tactic is not remotely permissible. The government is precluded from attempting to rescue its invalid criminal convictions based on a theory that was never presented to, much less considered and decided by, the jury. *See, e.g.*, *Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury . . . ."). As emphasized in all three of the reply briefs that respondents filed with the court of appeals, the jury was never asked to determine whether any part of Village Creek—which, in any event, is also wholly *intra*state—is navigable.

Indeed, at the sentencing hearing, the district court judge emphasized, with no dispute from the government, that "the only navigable stream that there was involved in this case was the Black Warrior River." Sent. Hr'g Tr. 138. And when the *defendants* attempted to cross-examine the government's expert witness to establish that Village Creek is *not* navigable-in-fact, the judge interrupted the examination to instruct the jury *not* to consider the navigability of Village Creek: "I want the jury to understand

that there's no proof required in this case that either Avondale Creek, nor Village Creek, has to be shown as being navigable." Trial Tr. 2243. Whether some jury could have theoretically concluded that Village Creek is navigable based on the sparse evidence that the government now attempts to marshal is irrelevant because "nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict." *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring). "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Id.* (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946)).

Even if the government *had* tried the case on the theory it waived, it failed to introduce evidence that would have allowed—much less compelled—a jury to conclude that Village Creek is navigable. The government contends that Village Creek is navigable because it is a "Section 10" water. Pet. 8, 9 & n.4.[8] With the benefit of more than three years of hindsight, the government now offers as its evidence of this freshly minted theory a single exhibit, GX177, a list of waterways that was drafted by the Army Corps of Engineers and not updated since 1977. Trial Tr. 2233–34. On its face, it states that Village Creek is navigable for just 1.3 miles—less than 3% of the creek's 44-mile length. And the exhibit contains

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[8] The government never even cited Section 10 in this case until *after* the court of appeals reversed respondents' convictions.

no explanation of how the Corps went about trying to define its own authority over Village Creek under Section 10. Consequently, it is impossible to tell from GX177 whether the Corps' decades-old list reflects the Corps' application of any legal standards—certainly any contemporary legal standards—relevant to the determination of navigability-in-fact.

Not surprisingly, the court of appeals declined the government's effort to salvage the convictions with a theory invented long after the jury had rendered its verdict. It held that the district court's instructions were erroneous because they did not "advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the *Black Warrior River*." Pet. App. 26a (emphasis added). At best the government comes before this Court with a disagreement over how the uncontroversial definition of *navigable-in-fact* waters should have been applied to the record in this case—a dispute surely unworthy of this Court's attention.

3. Even if the case *had* been tried on the theory that Village Creek was a navigable-in-fact waterway, and even if the government *had* introduced legally sufficient evidence under this theory, and even if the test favored by the plurality *would* allow prosecution of a discharge into Avondale Creek—none of which is true—together these things would *at most* establish that the court of appeals correctly rejected respondents' double jeopardy arguments for acquittal. There would nonetheless remain an independent reason that the outcome of this case—a new trial order—would remain unchanged. Even had there been legally sufficient evidence for a properly instructed jury to find guilt beyond a reasonable doubt (and there was not remotely that), respondents' convic-

tions would still have to be reversed because the government did not meet its burden of establishing that the undisputed instructional error was harmless beyond a reasonable doubt.

As the court of appeals explained, "[t]he problem in this case arises because the district court charged the jury that 'navigable waters' include 'any stream which may eventually flow into a navigable stream or river,' and that such stream may be *manmade* and flow '*only intermittently*[.]'" Pet. App. 11a (emphases added). Thus, it would not matter if natural origin and permanence were the only requirements for CWA coverage under the plurality's test, because the jury did not have *the opportunity to find* these elements proven. A judicial determination that a jury might have, or even probably would have, found those requirements to be met would blatantly violate respondents' right to trial by jury. A court simply may not usurp the jury's role by making *its own* findings to "cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (quoting *Cabana v. Bullock*, 474 U.S. 376, 384–85 (1986)). The violation of respondents' rights would be all the more egregious where—as here—the evidence that supposedly renders the error harmless beyond a reasonable doubt was the testimony of a single employee of one of the two government agencies that has defied this Court's rulings on the very question of whether a water is navigable within the meaning of the CWA.

There is another way in which the error cannot be considered harmless; it deprived respondents of a fair opportunity to rebut the government's case on

the navigable waters element. The record leaves no doubt that respondents repeatedly challenged the government's overbroad interpretation of the navigable-waters element from the outset, but the government successfully persuaded the trial judge of a sweeping view of the law that rendered irrelevant in that courtroom all the facts that the government now seeks to be taken as true. As the court of appeals noted, "defendants had no incentive to present evidence regarding a lack of continuous flow, because the district court clarified prior to trial that its definition of 'navigable waters' would include waters with either continuous or intermittent flow." Pet. App. 30a n.20.[9] Indeed, when defense counsel at-

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[9] The government feebly argues that respondents suffered no such prejudice because, in support of their position at trial that pollutant-laden discharges did not occur, their expert testified that "numerous species of fish and aquatic invertebrates" inhabited Avondale Creek "year-round" and "do not move out of the area." Pet. 10 n.5. The government does not explain how, even when viewed with the benefit of hindsight, testimony tending to show that certain species of fish were partial to the waters of Avondale Creek could have possibly helped respondents establish the entirely separate point of a lack of continuous flow between that industrial creek and a body of water dozens of miles away. Nor is it remotely apparent how the defense had a proper incentive to develop evidence on such an element when respondents were told that the jury was not going to be instructed to make such a finding.

For good measure the government fails to make clear that the defense exhibits it now cites *were never even admitted in evidence at trial*. *See id.* Rather, to the extent any were used it was solely for *demonstrative* purposes before a jury that was not properly instructed on how they could be used even if they *had* been admitted. *See* Trial Tr. 4402 (court allowed certain defense exhibits, which were added to the court record in an ancil-

[Footnote continued on next page]

tempted to establish, on cross-examination of the government's expert, that Avondale Creek and Village Creek were not navigable waters, the judge repeatedly interrupted to note, in the jury's presence, that the questions were irrelevant. Trial Tr. 2239–44. Thus, the instructional error is not harmless regardless of whether the plurality test may be applied and regardless of whether the government is entitled to defend the convictions using Village Creek as the navigable-in-fact water.

4. The government's ultimate rationale for review is "to clarify the operation of the *Marks* rule." Pet. 26. *Marks* sets forth the method for applying fragmented decisions of this Court: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (ellipses in original; citation omitted).

The government's interpretation of *Marks* is wrong. *Marks* recognizes that precedent derives from *holdings*—that is, the judgments of courts—in cases or controversies, not from a prediction of future outcomes based on the sum of individual views from opposite sides of a ruling. The government acknowl-

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[Footnote continued from previous page]
lary hearing, to be used simply as demonstrative aids). It is impossible to conclude that the error of removing the correct definition of navigable waters from the jury was harmless under this or any other theory.

edges that "a dissenting opinion itself of course cannot supply a rule of law." Pet. 26. The government also observes that the *Marks* analysis "is not designed to gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce a particular result." Pet. 23 n.8. Yet the government implausibly argues that a rule of law can be divined in just such a manner—by combining the views unsuccessfully advanced by dissenting Justices with the positions taken by fewer than a majority of the Justices concurring in a judgment. Pet. 25–26. Although dissenting opinions are frequently cited for the persuasiveness of their reasoning, the government's suggestion that they can be mixed and matched with other opinions to manufacture binding precedent is positively at odds with the most fundamental principles of *stare decisis*. *See, e.g.*, *Marks*, 430 U.S. at 193 (analyzing the holding from the "'position taken by *those Members who concurred* in the judgments . . . .'" (emphasis added; citation omitted)).

5. In any event, this case provides no opportunity to rule on *Marks*'s application to *Rapanos*. Because respondents prevail under both Justice Kennedy's and the plurality's interpretation of the CWA in *Rapanos*, there is no occasion to choose between the two.

In fact, for this very same reason the government vigorously opposes the petition for certiorari in *Lucas v. United States*, No. 07-1512 (filed on June 2, 2008), a case that also concerns the scope of the CWA after *Rapanos*. In that case, the court of appeals concluded that "the evidence presented at trial supports all three of the *Rapanos* standards and the jury's finding that" the defendants "were 'guilty beyond a

reasonable doubt'" of violating the CWA. *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008). In opposition to the defendants' petition for a writ of certiorari, the government argued that this Court should deny review of the *Lucas* decision because the result there would be the same "regardless of which of the *Rapanos* standards the Court found to be controlling." Br. for United States in Opp. to *Lucas* Cert. Pet., No. 07-1512, at 15 (filed Aug. 29, 2008). The government's argument applies fully here. Because resolution of the *Marks* issue would not alter the outcome reached below, review is not warranted.

II. REVIEW IS UNWARRANTED BECAUSE IT WOULD AFFECT FEW, IF ANY, OTHER CASES

Even if the outcome of this case could be affected, review of the application of *Marks* to *Rapanos* is premature and would affect few, if any, other cases. Despite the government's fixation on the issue, *Marks* is a sideshow. The relevant question here is not whether—as the government contends—*Marks* means the opposite of what it says, but, rather, what is the operative rule governing the reach of the CWA. Although the government acknowledges this point in a footnote, Pet. 16 n.6, it fails to explain why a majority of this Court is more likely to agree on a test today than it was a mere two years ago.

Moreover, there is not yet a conflict worthy of the Court's attention. As the Eleventh Circuit recognized, the Seventh and Ninth Circuits agree with the application of *Marks* to *Rapanos* that compelled the reversal of respondents' convictions below. Pet. App. 20a. There is but one outlying court of appeals: the First Circuit. The conflict it created in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), can be corrected by the First Circuit's *en banc* mechanism

without this Court's intervention. Unless and until another circuit agrees with the First Circuit's minority view, this "conflict" is not ripe for resolution by this Court. Indeed, if this issue were genuinely pressing enough to merit the Court's attention, the government would have been expected to acquiesce to review of *Johnson*, which created the conflict. Tellingly, the government *opposed* review of *Johnson*. Br. for United States in Opp. to *Johnson* Cert. Pet., No. 07-9 (filed Aug. 31, 2007).[10]

Further, if the plurality did construe the CWA to cover some waters that Justice Kennedy's rule would exclude, there is no reason to believe that a ruling that allows prosecution under the plurality's test, in addition to Justice Kennedy's, would affect but the rarest of cases. The government concedes that "the *vast majority* of waters encompassed by the *Rapanos* plurality's standard could *also* be shown to bear a 'significant nexus' to traditional navigable waters as that term is used in Justice Kennedy's concurrence." Pet. 28 (emphases added). The dissenting Justices in *Rapanos*, the Seventh Circuit, and the Ninth Circuit all reached a similar conclusion. *Rapanos*, 547 U.S. at 810 n.14 (assuming that Justice Kennedy's rule "will be controlling in most cases"); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007) (concluding that Justice Kennedy's rule would command a majority "in almost all cases");

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[10] One might fairly wonder, especially after the government opposed review in *Johnson*, why the government now seeks review here. On the evidence of *SWANCC* and *Rapanos*, the government intends to honor no interpretation that this Court might give the CWA unless the government wins.

United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (reasoning that Justice Kennedy's test would define waters of the United States more narrowly than the plurality test only in "a rare case"). Indeed, no court of appeals assessing the scope of the CWA after *Rapanos* has held that the plurality's rule would have brought within the Act any discharge that could not be pursued under Justice Kennedy's rule. Even the court of appeals here went no further than to opine that "the decision as to which *Rapanos* test applies *may* be outcome-determinative." Pet. App. 29a (emphasis added).[11]

Accordingly, to the extent the question presented "has spawned litigation across the nation" after *Rapanos*, *see* Pet. 18, the litigation to date has addressed an issue that remains purely hypothetical. It is too early to tell whether—much less, how often—the plurality's test would lead to a different result than Justice Kennedy's test. It therefore would be premature for the Court to grant certiorari based on this nascent circuit conflict.

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[11] The First Circuit did not hold that the availability of the plurality test would affect whether the discharge in *Johnson* fell within the Act's scope. It merely vacated summary judgment for the government and remanded for fact-findings that would enable the court to apply either test. 467 F.3d at 66.

III. The Question Presented Is Not Ripe For Review Because The Responsible Federal Agencies Have Not Yet Promulgated Regulations That Could Minimize The Practical Difficulties Of Which The Government Complains

Recognizing—indeed, strategically making the case—that review *cannot* be grounded in an argument that the Eleventh Circuit's decision will significantly affect the scope of the Act, the government invites the Court to wade back into the CWA's bogs by arguing that the decision will have "significant practical ramifications" for enforcement agencies and landowners. Pet. 28–32. The same could be said, of course, about the interpretation of virtually any statute or regulation that agencies enforce. Review on that ground is particularly inappropriate here given the government's ability to ameliorate any such ramifications through agency rulemaking.

What sets the meaning of the term "navigable waters" apart from the multitude of issues offered up for this Court's review is not the issue's practical importance. Rather, it is the fact that the government yet again brings the issue to the Court before the agencies responsible for implementing the statute have so much as attempted to promulgate regulations that would carry out that duty in a manner consistent with the Court's rulings. As the Chief Justice observed little more than two years ago, the Court previously rejected the government's "view that its authority" under the CWA "was essentially limitless." *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring) (referring to *SWANCC*). Yet after the Court repudiated the government's position, the Army Corps of Engineers and the Environmental

Protection Agency decided against revising their regulations to conform to the Court's decision. As the Chief Justice further explained, "[r]ather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." *Id.* at 758. "The upshot" was "another defeat for the agency" in *Rapanos*. *Id.*

Now the government has returned to the Court in the same posture, seeking a judicial bandage where the appropriate response is to fashion a regulatory cure. Despite ample judicial guidance on how these agencies can accomplish what they purport to seek—a more efficient and straightforward process that would benefit the public and the regulated community, *see* Pet. 28–32—the EPA and the Corps *still* have not promulgated regulations reflecting "*some* notion of an outer bound to the reach of their authority." *Id.* (emphasis in original); *see also id.* at 812 (Breyer, J., dissenting) ("I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."). As Justice Kennedy's opinion noted, the government must "establish a significant nexus on a case-by-case basis" precisely because of "the potential overbreadth of the Corps' regulations." 547 U.S. at 782 (stating that case-by-case determinations are required "[a]bsent more specific regulations"). Instead of bringing their regulations into compliance with the law, the agencies once again ask *the Court* to bless their boundless interpretation of the CWA for the sake of "clear and administrable rules defining the scope of the CWA's coverage." Pet. 15.

As the Chief Justice predicted, "courts and regulated entities" have just begun "to feel their way on a case-by-case basis" through application of the CWA post-*Rapanos*. 547 U.S. at 758. "This situation is certainly not unprecedented. What is unusual in this instance, perhaps, is how readily the situation could have been avoided." *Id.* (citations omitted). Until the Corps and the EPA at least *try* to promulgate regulations that could avoid some of the "practical ramifications" of which they complain, this Court should reject the request to once again do that work for them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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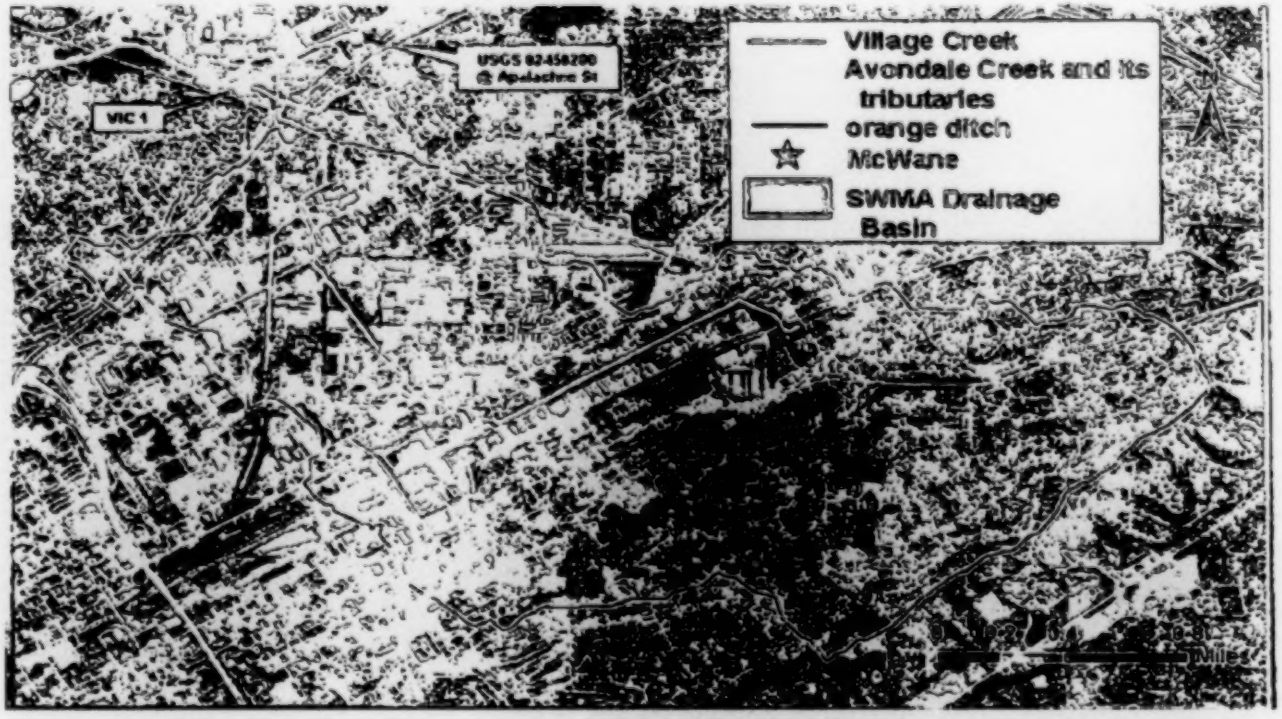
SEPTEMBER 22, 2008

APPENDIX

DEFENDANT'S EXHIBIT 103

BEST AVAILABLE COPY

Avondale Creek



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No. 08-223

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents do not dispute the central submissions supporting the government's petition for certiorari: The circuits are in conflict on the rule of law established by *Rapanos* v. *United States*, 547 U.S. 715 (2006). That conflict reflects a disagreement on how to discern the controlling principles of fractured decisions of this Court. And the confusion in the circuits—especially the Eleventh Circuit's holding that the Clean Water Act (CWA) does not necessarily cover waters satisfying a standard endorsed by eight Members of this Court in *Rapanos*—creates serious problems for effective CWA enforcement.

Respondents seek to shift the focus from those significant legal issues to a case-specific argument against CWA coverage here, based on a misunderstanding of both the *Rapanos* plurality's opinion and the record in this case. Respondents also downplay the significance

of the conflict and request that the Court defer its resolution until the government provides regulatory guidance, even though the conflict itself precludes an effective and nationally uniform regulatory program. Respondents' arguments against review lack merit. This Court's intervention to identify the controlling legal rule in *Rapanos* is urgently needed, as confirmed by the numerous industry amici supporting the petition.

A. The Decision Below Creates An Acknowledged Circuit Conflict That Warrants Immediate Review

1. Respondents concede (Opp. 11) that the circuits disagree on the rule of law that emerged from *Rapanos*. As the court below expressly recognized (Pet. App. 20a-23a), its holding that CWA coverage may be established under *only* Justice Kennedy's "significant nexus" standard directly conflicts with *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007), which held that coverage may be established under *either* Justice Kennedy's standard *or* the *Rapanos* plurality's standard.

Contrary to respondents' contention (Opp. 28-29), this Court's review of the conflict is warranted now. The issue is recurring and has already been addressed by four circuits in the two years since *Rapanos*. Pet. 16-19. Because the issue hinges entirely on this Court's interpretation of its own decision, further percolation in the lower courts is unlikely to provide assistance. And postponing review would exacerbate the serious problems that the conflict is already creating—uncertainty about thousands of CWA coverage determinations made under the *Rapanos* plurality's standard; significant resource burdens on both the government and the regulated community because of the complexity in applying the "sig-

nificant nexus" standard; and an unacceptable regional disarray in the conduct prohibited by federal criminal law. Pet. 28-31.[1]

2. Respondents also do not dispute that the conflict on the meaning of *Rapanos* reflects an additional disagreement among the circuits on how to apply *Marks* v. *United States*, 430 U.S. 188 (1977), and to discern the controlling principles of fractured decisions of this Court. As amicus Pacific Legal Foundation explains (Br. 4-15), that issue itself deserves this Court's review. Respondents make no effort to explain why the conflict over *Marks* does not merit review.

Instead, respondents insist that the only "relevant question" is the test governing CWA coverage and that "a majority of this Court is no more likely to agree on a test today" than when it decided *Rapanos*. Opp. 29. On the contrary, a majority of the Court may well agree on the standard governing CWA coverage in this case, which arises in a very different context than *Rapanos*. Unlike *Rapanos*, which involved landowners placing fill into wetlands on their property, this case involves respondents discharging thousands of gallons of polluted wastewater into a perennial stream that feeds, in a continuous flow, into traditional navigable waters. Pet. 6-9.

In any event, certiorari is warranted to resolve the distinct question of what controlling rule of law was established by *Rapanos* in light of the principles govern-

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[1] Although respondents argue (Opp. 28-29) that the First Circuit might eliminate the conflict by granting en banc review, that is highly unlikely because the First Circuit denied en banc review in *Johnson* itself. Respondents also erroneously contend (Opp. 29) that the government's opposition to review in *Johnson* shows the issue's unimportance. The circuit conflict did not exist then; it was created by the decision below. Pet. 16-19.

ing interpretation of fractured decisions. Resolving that question would not necessarily require the Court to bridge the gap that could not be crossed in *Rapanos*. But it would be of enormous benefit to both the government and the regulated community.

B. This Case Is An Appropriate Vehicle To Resolve The Conflict

Respondents primarily claim (Opp. 12-26) that this case is not an appropriate vehicle to resolve the circuit conflict because, in their view, the government would not prevail even under the *Rapanos* plurality's standard. That contention is flawed on multiple levels.

1. First, respondents' contention is contrary to the very decision they purport to defend. The court below determined that the district court's instructional error "may well have been harmless" under the plurality's standard. Pet. App. 29a. For that reason, the court concluded, "the decision as to which *Rapanos* test applies may be outcome-determinative in this case." *Ibid.* That conclusion is fatal to respondents' position. Because the question presented "may be outcome-determinative," certiorari is warranted to resolve it, even if this Court, after ruling for the government, chooses to remand for application of the correct standard by the court below.

2. Respondents' vehicle argument is also flawed because it rests on a fundamental mischaracterization of the plurality's standard. Respondents assert that, under the plurality's opinion, a tributary qualifies as a "water[] of the United States," 33 U.S.C. 1362(7), only if it is "physically proximate" (Opp. 16) to traditional navigable waters. That is incorrect. According to the plurality, "a relatively permanent body of water *connected to* traditional interstate navigable waters" is a "water[] of the

United States." 547 U.S. at 742 (emphasis added). That standard is satisfied whenever a tributary with relatively permanent flow feeds, through like-waters, directly or indirectly into traditional navigable waters. Adjacency, or some nebulous degree of "proximity," is not required.

The plurality indicated that "waters of the United States" include "relatively permanent, standing or continuously flowing bodies of water, 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" 547 U.S. at 739. Thus, under the plurality's standard, covered waters do not include "channels containing merely intermittent or ephemeral flow." *Id.* at 733-734. But the plurality nowhere suggested that relatively permanent tributaries are "waters of the United States" only if they satisfy an additional requirement of "physical proximity" to traditional navigable waters. On the contrary, the plurality stated that "channels containing permanent flow are plainly within the definition." *Id.* at 733 n.5.

Indeed, a "proximity" requirement is inconsistent with the plurality's remand instructions. The plurality instructed the lower courts to determine "whether the ditches or drains" at issue were "'waters' in the ordinary sense of containing a relatively permanent flow." 547 U.S. at 757. The plurality did *not* instruct those courts to determine whether the ditches or drains were "physically proximate" to traditional navigable waters, even though, earlier in its opinion, the plurality noted that the nearest navigable water was 11 to 20 miles from one of the discharge sites. *Id.* at 720.

Respondents contend that a "proximity" requirement for tributaries is supported by the "plurality's repeated references to 'adjacency.'" Opp. 16. But the plurality

referred to adjacency only in discussing when *wetlands* are covered under the CWA because they are "adjacent to" other "waters of the United States." 547 U.S. at 742, 748, 755 (cited at Opp. 15). The plurality did not mention adjacency in discussing when *tributaries* are covered because they are themselves "waters of the United States." *Id.* at 730-739.

Likewise, respondents mistakenly rely (Opp. 13) on the plurality's statement that "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an a*dequate* condition." 547 U.S. at 736 n.7. The plurality made that statement in explaining that "elaborate, manmade, enclosed systems"—such as sewage treatment plants and municipal waterworks—"likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water." *Ibid.* That conclusion provides no support for a "proximity" requirement.

Nor is a "proximity" requirement supported by the plurality's statement that "the lower courts do not generally rely on characterization of intervening channels as 'waters of the United States' in applying" the CWA's prohibition of unauthorized discharges. 547 U.S. at 745 (quoted at Opp. 14). The plurality made that statement in arguing that excluding "*intermittent* channels as 'waters of the United States'" would not impair CWA enforcement because "discharge[s] into *intermittent* channels" would still be proscribed if pollutants reached "covered waters." *Id.* at 743 (emphasis added). The plurality's statement in no way contradicts its earlier recognition that *relatively permanent* channels *are* "covered waters" if they connect (directly or indirectly) to traditional navigable waters.

Respondents also erroneously contend (Opp. 16-18) that a "proximity" requirement is supported by the plurality's criticisms of decisions like *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). The plurality did not criticize those decisions for covering tributaries that were too "remote." Opp. 16. It criticized them for covering tributaries that were only "ephemeral channels and drains." 547 U.S. at 726. Nothing in the opinion indicates that the plurality adopted a "proximity" requirement for tributary coverage under the CWA.[2]

3. Under the plurality's standard properly understood, the trial evidence overwhelmingly established that Avondale Creek, the stream into which respondents routinely dumped contaminant-laden wastewater, is a covered water. As the petition explains (at 8-10), abundant, uncontroverted evidence established that Avondale Creek flows year-round and feeds, in an uninterrupted flow, into traditional navigable waters.[3]

Respondents suggest that Avondale Creek is not a covered water because the government did not prove its "natural origin" (Opp. 24) and parts of it have been "channelized and straightened" (Opp. 9). Even if a showing of "natural origin" were required, the uncontroverted evidence established that Avondale Creek, which has a four-square-mile watershed, has been a hydro-

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[2] Respondents suggest (Opp. 17) that the plurality adopted the holding of *In re Needham*, 354 F.3d 340 (5th Cir. 2003). The plurality did not cite that decision, much less adopt its holding.

[3] Respondents' assertion (Opp. 24-26) that they lacked incentive to present evidence that Avondale Creek flows only intermittently is beside the point. Their own evidence conclusively proved the creek's continuous flow by establishing that numerous fish live there year-round. Pet. 10 n.5.

graphic feature for more than 100 years. Tr. 4402-4403, 4096-4097. Moreover, nothing in the plurality's opinion suggests that partial channelization or straightening disqualifies a water from CWA coverage. Most major rivers (including the Chicago, Columbia, and Mississippi) have channelized segments.[4]

Likewise, the record does not support respondents' claim (Opp. 19-20) that the government failed to prove that Avondale Creek feeds into *interstate* traditional navigable waters. The jury found that Avondale Creek flows into water "used or * * * susceptible of being used in its ordinary condition, as a highway for *interstate* commerce." Pet. App. 11a-12a (emphasis added). That definition of "navigable water of the United States" from *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), was recognized by the *Rapanos* plurality, 547 U.S. 730-731 & n.3.

Ample evidence supported the jury's finding. The evidence established that Avondale Creek flows into Village Creek, which feeds into the Locust Fork River and then the Black Warrior River. Tr. 2229-2231. Respondents never challenged the status of the Black Warrior River as a traditional navigable water at trial, and they conceded that status on appeal. Tr. 2235; Devine C.A. Br. 22-24; Delk C.A. Br. 17-20; McWane C.A. Br. 13-14; Devine C.A. Reply Br. 14; Delk C.A. Reply Br. 3-4; McWane C.A. Reply Br. 5. Respondents now argue

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[4] Respondents also incorrectly imply (Opp. 17, 20) that the existence of a dam on Village Creek, the tributary into which Avondale Creek flows, cuts against CWA coverage. Such improvements neither defeat navigability, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940), nor preclude CWA coverage. Many major rivers (including the Colorado, Columbia, Mississippi, and Ohio) have dams spanning their widths.

(Opp. 19-20 n.7) that the Black Warrior River is not an *interstate* traditional navigable water because it is located entirely in Alabama. Whether the Black Warrior River crosses state borders is irrelevant, however, because it feeds through other navigable rivers into the Gulf of Mexico.[5]

Respondents repeatedly argue that Avondale Creek is "more than forty-five miles" from the nearest traditional navigable waters (Opp. 3, 9, 20) as if distance held a talismanic significance under the CWA. It does not. Such a rule would illogically expose traditional navigable waters to damage from pollutants solely because a polluter happened to dump toxins into a distant upstream tributary. In any event, Village Creek is a traditional navigable water in its final 1.3 miles, as the evidence established. Pet. 8-9 & n.4; GX 177; Tr. 2236-2237.

Respondents contend (Opp. 20-23) that the government cannot argue in this Court that Village Creek is a traditional navigable water because the government did not make that argument below. On the contrary, the government has consistently asserted that Village Creek is a traditional navigable water. See Gov't Consolidated Resp. to Defs'. Mot. 23 n.11; Gov't C.A. Br. 38-40. In any event, that is a matter that should be addressed on remand, if this Court clarifies that the *Rapanos* plurality's standard suffices to establish CWA coverage.

Finally, respondents mistakenly argue that, despite the overwhelming evidence that Avondale Creek is a covered water under the plurality's standard, their convictions must be reversed because "the jury did not have *the opportunity to find*" that the creek flows continu-

[5] The Black Warrior River flows into the Tombigbee River, which flows, via the Mobile River, into the Gulf of Mexico. See http://www.outdooralabama.com/fishing/freshwater/where/ rivers/rivers.cfm.

ously. Opp. 24. That argument is inconsistent with *Neder* v. *United States*, 527 U.S. 1 (1999), which held that, when a jury instruction omits or misdescribes an offense element, the error is harmless if a rational jury would have had to find that element based on the evidence. And the Eleventh Circuit acknowledged that, if the plurality's standard applies, any instructional error may well have been harmless. Pet. App. 29a.

C. The Decision Below Is Incorrect

As the petition explains (at 19-28), the court below erroneously held that Justice Kennedy's standard provides the controlling rule of law under *Rapanos*, even when it excludes from CWA coverage waters that would be covered under the standards adopted by eight Members of this Court.

Respondents' only defense of that holding is their argument (Opp. 26-27) that, under *Marks*, dissenting opinions can never be consulted to ascertain the rule of law established by a fractured decision. But that argument cannot be squared with numerous decisions of this Court that have considered dissenting opinions for that purpose. See Pet. 24-25 (citing cases). Those decisions establish not only that *this Court* may consider dissenting views, *e.g.*, *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1045 (2008), but that *lower courts* also may do so, *e.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr.*, 460 U.S. 1, 17 (1983) (holding that "Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test"). Tellingly, respondents do not even try to defend the court of appeals' conclusion that Justice Kennedy's opinion is controlling, much less to justify the "bizarre outcome" that the court's con-

clusion produces—a ruling that CWA coverage of waters is not established, even though eight Members of this Court would find coverage. *Johnson*, 467 F.3d at 64.

D. The Question Presented Is Important

Respondents argue (Opp. 29-30) that review of the question presented is not important because the choice between Justice Kennedy's and the plurality's standard will affect the outcome of only a handful of cases. But, as the petition explains (at 28-32), whether or not the choice of standard proves outcome-determinative in a large number of cases, the erroneous decision below and the resulting conflict significantly impede effective enforcement of the CWA and burden both the government and the regulated public. The numerous amicus briefs supporting the petition, filed on behalf of broad segments of the business community and the affected public, confirm the importance of this Court's review.

The decision below may call into question thousands of CWA coverage determinations in the Eleventh Circuit. Pet. 29-30. Thousands of coverage determinations have been made under the plurality's standard in other circuits as well, and those determinations will also be subject to challenge (except in the First Circuit) unless this Court grants review and reverses the ruling below. In addition, ascertaining CWA coverage under the "significant nexus" standard requires substantially more time and expense for both the government and the regulated community. Pet. 28-30. And, because CWA violations can trigger criminal penalties, the conflict over CWA coverage means that conduct that is legal in one jurisdiction may be prosecuted in another. Pet. 31.

Respondents do not dispute that the decision below has "significant practical ramifications." Opp. 31. But

respondents argue that the Court should nonetheless deny review because, they assert, the government could eliminate the problems by promulgating regulations. That is not correct.

The government cannot by regulation resolve whether, under *Rapanos* and the Court's jurisprudence on fractured decisions, the plurality standard has any legal force. If the government promulgated a rule allowing CWA coverage to be established under either standard, the regulation would be invalid *ab initio* in the Eleventh Circuit and subject to challenge in numerous other jurisdictions. Further direction from this Court is thus essential to resolve the uncertainty over the scope of the CWA. Moreover, this Court customarily resolves circuit conflicts on important questions of federal law—especially when they turn on the meaning of the Court's own decisions—rather than permitting those conflicts to persist and requiring the Executive or Congress to work around erroneous constructions of federal law.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MCWANE, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION®, AMERICAN FOREST & PAPER ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The *Amici Curiae* jointly have broad and united interests, as described below.[1]

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *Amici Curiae*'s intention to file this brief. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. No counsel for a party authored this brief in whole or in part, and no counsel or

American Farm Bureau Federation® ("Farm Bureau") is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1919. It was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than six million member families. Farmers and ranchers routinely use ponds, lagoons, internal channeling ditches, stock ponds, and holding structures as part of productive and necessary farming and ranching activities and thus have a keen interest in the scope of the Clean Water Act.

American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products. AF&PA participates in administrative proceedings arising under the Clean Water Act, and in litigation arising from those proceedings, that affect the forest, paper, and wood products industry.

Associated General Contractors of America ("AGC") is the leading national construction trade association, representing all facets of commercial construction for both public and private entities, including building, heavy, highway, and municipal projects. AGC and its

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party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

nationwide network of chapters have advocated for the construction industry for nearly a century. AGC's members' construction activities often require permits under the Clean Water Act, and, therefore, the scope of regulation under the Act is of great importance to AGC members.

Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern, such as the scope of the Clean Water Act.

National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. This includes policies under federal environmental laws like the Clean Water Act.

SUMMARY OF ARGUMENT

This Court should grant the Petition of the United States for a Writ of *Certiorari* to resolve confusion regarding the scope of waters subject to the Clean Water Act ("CWA") created by the response of the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, "Agencies") and the courts below to this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies have failed to discern the holding in *Rapanos* consistent with rules for interpreting plurality decisions of the Supreme Court. This failure has led to the Agencies misinterpreting *Rapanos* and misapplying the CWA to reach waters that both the plurality and concurring opinions in *Rapanos* concluded are beyond the scope of the CWA. Faced with these broad assertions of CWA jurisdiction, the courts have struggled with and split over how to apply *Rapanos*.

This brief describes and provides examples of the degree of confusion and legal risk clouding the Agencies' extensive CWA regulatory program. This regulatory overreach, confusion, and legal risk will continue and extend unless this Court reviews the Court of Appeals' decision and gives direction to the Agencies.

INTRODUCTION

Amici support *certiorari* in this case. The Agencies are ignoring basic rules that govern interpretation of this Court's decisions and are misconstruing key jurisdictional concepts set forth in *Rapanos*. The Agencies issue more than 100,000 jurisdictional determinations and review more than 80,000

individual and general permit applications in an average year.[2] Their response to *Rapanos* has serious implications for a wide range of commercial, agricultural, and public works projects.

Rapanos was the last CWA jurisdictional case decided by this Court. At issue in *Rapanos* was the Agencies' assertion of CWA jurisdiction over "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters." 547 U.S. at 729 (plurality opinion). The Agencies claimed that CWA jurisdiction extended to any water with any hydrological connection to traditional navigable waters. *See id.* at 784 (Kennedy, J., concurring). The plurality opinion and Justice Kennedy's concurring opinion both rejected the Government's "any hydrologic connection" theory as a basis for CWA jurisdiction. *Id.* at 740-42 (plurality opinion), 784 (Kennedy, J., concurring).

The *Rapanos* plurality concluded that CWA jurisdiction is limited to waters that are (1) "relatively permanent, standing or continuously flowing bodies of water" connected to traditional interstate navigable waters, and (2) wetlands with a "continuous surface connection" to such waters such that "there is no clear demarcation between" the wetlands and the "relatively permanent waters." *Id.*

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[2] Statement of Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army, Before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works, United States Senate (August 1, 2006), *available at* http://www.epa.gov/ow/speeches/060801bg.html.

at 739, 742 (plurality opinion) (internal citations and quotations omitted). The plurality specifically noted that wetlands with "only an intermittent, physically remote hydrologic connection . . . do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." *Id.* at 742.[3] In a concurring opinion, Justice Kennedy concluded that CWA jurisdiction requires in all cases a "significant nexus" to traditional navigable waters, which must be demonstrated by substantial evidence showing the "measure of the significance of the connection" to traditional navigable waters. *Id.* at 784 (Kennedy, J., concurring). He, too, stated that a mere hydrological connection is not enough.

Members of the Court agreed that the Agencies should promptly address CWA jurisdiction through rulemaking. *See* 547 U.S. at 726 (plurality opinion) (the Corps proposed "rulemaking in light of *SWANCC* . . . but ultimately did not amend its published regulations"); *id.* at 758 (Roberts, C.J., concurring) (rather than "refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power"); *id.* at 782 (Kennedy, J., concurring) ("[a]bsent more specific regulations" the Corps must establish jurisdiction on a "case-by-case basis"); *id.* at 812 (Breyer, J., dissenting) (*Rapanos* opinions taken together call for the Corps "to write new regulations, and speedily so"). The *Amici* wholeheartedly agree.

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[3] Citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) and *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

But rather than conduct the rulemaking urged by Members of this Court, the Agencies issued "interim guidance."[4] EPA & Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision In *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007) (hereinafter "Guidance"), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/app_a_rapanos_guide.pdf. The Agencies' Guidance and the determinations made under it are critically flawed because (1) the Agencies conclude that they can rely on the dissenting opinions to find two alternative holdings in this case, contrary to fundamental principles that govern interpretation of this Court's decisions, and (2) the Agencies have significantly misconstrued key elements of the *Rapanos* opinions, including "traditional navigable waters," "relatively permanent waters," and

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[4] One reason this case is so important is that the avenues for judicial review of the Agencies' jurisdictional assertions under the CWA are very limited. By issuing guidance rather than undertaking rulemaking, the Agencies would offer members of the public a Morton's Fork for challenging their assertions of jurisdiction: (1) in an enforcement action, or (2) after spending between 313 and 788 days and between $28,915 and $271,596 to obtain a permit from the Corps. *See Rapanos*, 547 U.S. at 721 (plurality opinion) (noting the time and cost involved in obtaining a Corps CWA permit); *compare Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007) (discussing availability of judicial review of agency guidance which appears to be or is applied as binding) *and Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs.*, No. 07-35545, 2008 WL 4181602 at *4-5 (9th Cir. Sept. 12, 2008) (holding that Corps jurisdictional determinations are not final agency action subject to judicial review at the time they are issued, but noting that CWA jurisdiction may be challenged in a later enforcement action or permit challenge).

"significant nexus," to substantially expand their jurisdiction under the CWA.

The Agencies seek a writ of *certiorari* to obtain this Court's endorsement of their flawed approach to interpreting *Rapanos*. They also want the Court to endorse their expansive view of the jurisdictional tests described in *Rapanos*. *Amici* strongly agree that *certiorari* is needed, but to correct rather than endorse the actions of the Agencies.[5]

ARGUMENT

I. THE AGENCIES HAVE NOT FOLLOWED FUNDAMENTAL RULES GOVERNING INTERPRETATION OF THIS COURT'S DECISIONS.

The Agencies fail to discern an actual holding in *Rapanos*. Instead, they take the astonishing position that they can pick and choose between *either* the plurality's "relatively permanent waters" test *or* Justice Kennedy's "significant nexus" test. *See* Guidance at 3. Even more surprising, they argue that they can rely on the dissenting opinions to establish majority support for either test because "[w]hen there is no majority opinion in a Supreme

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[5] The focus of *Amici* is not on the facts of this case, but rather the serious legal and practical implications of the Agencies' and the courts' interpretation of CWA jurisdiction following *Rapanos*. However, the fact that this case arises in a criminal context while the public, the Agencies, and the courts are all struggling to understand and apply *Rapanos* underscores the gravity of the legal and practical issues at stake. Accordingly, *Amici* believe it is important to review CWA jurisdiction as it applies to all types of water bodies. If consideration of other cases in addition to this one would facilitate comprehensive review, *Amici* would support granting certiorari in those cases as well.

Court case, controlling legal principles may be derived from those principles espoused by five or more Justices." *Id.* This is counting heads, not the faithful execution of the law.

The Agencies cannot interpret a ruling of this Court as having two alternative holdings, and cannot rely on the views of dissenting Justices to identify a holding. It is fundamental that cases are interpreted through their holdings. A holding is the "necessary" and "pivotal" logic that results in a decision in the case. *See* BLACK'S LAW DICTIONARY 749 (8th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); *id.* at 1102 (defining "*obiter dictum*" as a comment in a judicial opinion "that is unnecessary to the decision in the case and therefore not precedential"). It is also fundamental that dissenting opinions are not part of a case's holding. *See* 20 AM. JUR. 2D *Courts* § 138 ("A minority opinion has no binding, precedential value"); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2006) ("Stare decisis does not apply to dissenting opinions.") These basic principles are reflected in this Court's *Marks* rule, which says:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as *that position* taken by those Members *who concurred in the judgments* on the narrowest grounds.

Marks v. United States, 430 U.S. 188, 193 (1977) (emphasis added and internal quotations omitted); *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (referencing *Marks*).

The Agencies make no effort, as required by *Marks*, to determine "the holding" of "those Members who concurred in the judgments" in *Rapanos*. Instead, they reinvent *Marks* because they claim Justice Kennedy's opinion is not a perfect subset of the plurality's opinion or vice-versa. This narrow view misses the point. The Agencies' obligation is to find the common ground between the plurality and Justice Kennedy that produced the judgment in *Rapanos*. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir. 1992) (the "essence" of *Marks* is to find "common ground" among Justices who concurred in judgment).[6] As explained in Part II below, the Agencies have not found that common ground at least in part because they misinterpret both the plurality and concurring opinions.

Even assuming, for the sake of argument, that no common ground exists between the plurality and Justice Kennedy, such a lack of commonality would not give the Agencies license to interpret *Rapanos* based on the views of dissenting Justices or to arrive at alternative holdings. The Agencies seek a writ of *certiorari* effectively to obtain such license from this Court. The Court of Appeals correctly rejected the Agencies' "either/or" approach. *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (that the dissenting Justices would find CWA jurisdiction under both tests "is of no moment under *Marks*"). The Agencies, however, continue to treat the dissent

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[6] *See* Brief of *Amici Curiae* National Association of Home Builders and Chamber of Commerce of the United States of America Supporting Petitioners on Petition for Writ of *Certiorari* at 12-17, *Lucas v. United States*, No. 07-1512, 2008 WL 2697353 (U.S. July 7, 2008), identifying seven points of convergence between the plurality and concurring opinions.

as part of *Rapanos*' holding, and, if the past is prologue, will continue to do so until this Court clarifies that *Rapanos* must be applied consistently with *Marks* and the basic definition of a holding.

II. THE AGENCIES' INTERPRETATION OF KEY JURISDICTIONAL CONCEPTS FROM *RAPANOS* IS INCONSISTENT WITH THE PLURALITY AND CONCURRING OPINIONS THAT SET FORTH THOSE CONCEPTS.

This Court should grant *certiorari* because the Agencies are implementing the CWA in a manner fundamentally at odds with this Court's decision in *Rapanos*, which has led the lower courts to struggle with and split over how to apply *Rapanos*.

In particular, the Agencies have (1) deemed water bodies to be traditional navigable waters if they have enough water to "float a boat" or if they have the potential to be visited by out-of-state residents; (2) issued Guidance stating a water body may be deemed "relatively permanent" in accordance with the plurality opinion if it flows only three months a year (or even less); and (3) converted Justice Kennedy's "significant nexus" into "a" nexus. We address each of these elements in turn..

A. Traditional Navigable Waters Must Be Highways for Trade and Travel in Interstate and Foreign Commerce.

Whether a water body is a traditional navigable water is of fundamental importance after *Rapanos* because both the plurality and Justice Kennedy premise jurisdiction over non-navigable waters on the non-navigable water's relationship to traditional

navigable waters. While the plurality and Justice Kennedy used varying formulations ("traditional interstate navigable waters" and "navigable waters in the traditional sense"),[7] the waters to which they are referring are unmistakable from the cases they cite – *The Daniel Ball v. United States* and *United States v. Appalachian Electric Power Company*.[8]

The Daniel Ball and *Appalachian Electric* are cornerstones in a series of cases defining "navigable waters of the United States." In *The Daniel Ball*, the Court held that:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water*. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contra-distinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a *continued highway over which commerce is or may be carried on with other States or foreign countries* in the customary modes in which such commerce is conducted by water.

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[7] 547 U.S. at 742 (plurality opinion); *id.* at 779 (Kennedy, J., concurring).

[8] *See Rapanos*, 547 U.S. at 734 (plurality opinion) (citing *The Daniel Ball v. United States*, 10 Wall. 557, 563 (1871) and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-409 (1940)); *id.* at 761 (Kennedy, J., concurring) (same).

The Daniel Ball, 10 Wall. 557, 563 (1871) (emphasis added).[9] Seventy years later, in *Appalachian Electric*, the Court held that a water could also be deemed "navigable" if it could be made navigable by "reasonable improvements." 311 U.S. at 407.

The Agencies ignore the opinions' citations to *The Daniel Ball*, and instead define "traditional navigable waters" as:

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide. 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1).

Guidance at 4-5. They explain in a footnote that:

> The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

Guidance at 5 n.19.

In other words, *The Daniel Ball* waters are only a subset of the Agencies' new definition of traditional navigable waters. The definition also reaches waters that are, were, or could be subject to *any use* in interstate commerce. This is a critical – and impermissible – expansion of the traditional navig-

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[9] *See also Minnehaha Creek Watershed District. v. Hoffman*, 597 F.2d 617, 622-23 (8th Cir. 1979) ("*The Daniel Ball* test is bi-partite: first, the body of water must be navigable in fact; and second, it must itself, or together with other waters, form a highway over which commerce may be carried on with other states.").

able waters concept, which goes well beyond what the plurality and concurring opinions referred to as "traditional interstate navigable waters" or "navigable waters in the traditional sense." The cases cited by the plurality and Justice Kennedy in reference to traditional navigable waters emphasize the use of such waters as "highways for commerce." Use "*in* interstate commerce" is far broader than use *as* waterborne "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall. at 563.

Moreover, the unexplained reference to "navigable-in-fact" waters has bred confusion among field staff who have to apply the Guidance. Many of them do not know that "navigable-in-fact" is a legal term of art grounded in *The Daniel Ball*, and instead have read it literally to mean that a water is "navigable-in-fact" if it can "float a boat." Traditional navigable waters determinations issued in the wake of the Guidance reinforce that mistaken belief. Bah Lakes, an isolated 70-acre lake in Minnesota with 10-foot-deep water, was deemed a traditional navigable water because "its physical characteristics . . . indicate that the waterbody has the capacity to be navigated by watercraft." EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/BahLakeEPA_memo2007-04488.pdf (hereinafter "Bah Lakes TNW Determination") at 2; *see also* EPA and Corps, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/TNW_MVP-2007-1497.pdf (hereinafter "Boyer Lake TNW Determination"). This is a far cry from the highways of commerce the Court described in

The Daniel Ball to explain what it meant when it said "navigable in fact."

Other traditional navigable waters determinations cite "affecting commerce" factors eerily reminiscent of the Migratory Bird Rule this Court rejected in *SWANCC*. A segment of the Little Snake River was deemed a traditional navigable water because it is "accessible to the public," various wildlife agencies float "various reaches of the . . . River . . . as part of aquatic life monitoring," and hunting and fishing lodges in the general vicinity are a "documented source of interstate travelers in the area." EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), http://www.usace.army/mil/cw/cecwo/reg/cwa_guide/TNW_NWO-2007-1550.pdf (Little Snake River). Likewise, Boyer Lake in Minnesota was deemed a traditional navigable water because the public has access to the lake, the lake has the capacity to be navigated by watercraft, and some of the recreational fishermen using the lake come from North Dakota. *See* Boyer Lake TNW Determination at 2. The Bah Lakes traditional navigable waters determination mentioned above noted that the lake is approximately 60 miles from the North Dakota border and therefore "readily accessible to interstate travelers." Bah Lakes TNW Determination at 3.

None of these determinations meets the criteria of *The Daniel Ball* and its progeny. Rather, they go well beyond the limits recognized in the opinions of the plurality and Justice Kennedy in *Rapanos*. Of course, the farther up the watershed a traditional navigable water can be found, the easier it will be to find that other remote water bodies have a significant nexus to traditional navigable waters.

B. Relatively Permanent Waters Must be Relatively "Permanent."

The Agencies specifically seek *certiorari* so that they can continue to apply their mistaken interpretation of the plurality's "relatively permanent waters" test. The Agencies' interpretation of this standard, however, completely misconstrues the plurality opinion by eliminating its hallmark namely, that the waters in question be "permanent."

Emphasizing the significance of the statutory term "navigable," the *Rapanos* plurality determined that "waters of the United States" include "only those *relatively permanent*, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes." *Rapanos*, 547 U.S. at 739 (plurality opinion) (emphasis added) (internal citations and quotations omitted). The plurality distinguished these "relatively permanent waters" from "ordinarily dry channels through which water occasionally or intermittently flows . . . transitory puddles . . . ephemeral flows of water . . . storm sewers and culverts . . . man-made drainage ditches, and dry arroyos in the middle of the desert." *Id.* at 733-34. By the plurality's view, even the "least substantial of the definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel . . . " and "[u]nder no rational interpretation are typically dry channels" considered permanent waters. *Id.* at 733, 735.

The Agencies' definition of "relatively permanent waters" flouts the concept adopted by the plurality. Their Guidance says a water body may be deemed "relatively permanent" if it has "continuous flow at least seasonally (e.g., *typically three months*)."

Guidance at 5-6 (emphasis added). They cite footnote 5 of the plurality opinion, which, according to the Guidance, "explain[s] that 'relatively permanent' does not necessarily exclude waters 'that might dry up in extraordinary circumstances such as drought' or '*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'" Guidance at 6 n.22, citing 547 U.S. at 733 n.5 (plurality opinion) (emphasis in original). This is a non sequitur. A statement that "seasonal" waters are "not necessarily excluded" does not mean that all waters that flow "seasonally" are *necessarily included.*[10]

Even more troubling, the Agencies have deleted from their quotation of the plurality opinion the example the plurality used to explain what it meant by a "seasonal river" – *i.e.*, "the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." 457 U.S. at 733 n.5 (plurality opinion). The plurality's 290-day example has been excised, and the "seasonal river" it exemplified converted to 90 days of flow. Ninety days is 200 days less than 290 days. Moreover, using 90 days of flow to define a water as "relatively permanent" is completely at odds with the plurality's observation that "[c]ommon sense and common usage distinguish between a wash and a seasonal river." *Id.* The Agencies have set forth an

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[10] The Agencies' creative interpretation of the plurality's opinion is not limited to the term "permanent." The Guidance observes that the plurality requires that wetlands have a "continuous surface connection" to relatively permanent waters, and then notes boldly that for purposes of the Guidance "[*a*] *continuous surface connection does not require surface water to be continuously present . . .* " Guidance at 6 n.25 (emphasis added).

interpretation of the relatively permanent standard that can allow jurisdiction over a wide range of non-permanent waters that are the *opposite* of permanent, such as streams that are ordinarily dry.

Notwithstanding the infirmities of the Agencies' three-month flow standard, some Corps districts and EPA regions are ignoring even this overbroad test and applying their own *ad hoc* test, allowing the "relatively permanent" standard to be met by flow for even *less than three months each year*. For example, in response to questions regarding how to apply the Guidance to ephemeral drainages in the arid West, an e-mail broadly circulated within the South Pacific Division in July 2007 states the following:

> EPA has indicated to us that the requirement for an RPW to have three consecutive months of flow annually is guidance only. They have indicated that any watercourse which has "predictable, seasonal flow" could be considered an RPW.

See E-mail from Corps official to various stakeholders (July 23, 2007, 3:34 p.m.) (attached hereto at Appendix A). As this communication suggests, field staff appear to be disregarding the Guidance because it is "guidance only," and thus applying their own *ad hoc* interpretation of what constitutes "relatively permanent" flow. Under a "predictable, seasonal flow" standard suggested by this field communication, an ephemeral drainage with any amount of flow, whether for one hour, one day, one week, or one month per year could be deemed jurisdictional provided such flow is merely "predictable" and "seasonal."

Defining a relatively permanent water as any "predictable, seasonal flow" – without regard to vol-

ume, duration, and frequency of flow, and without regard to the relationship to a traditional navigable water – is not only at odds with the *Rapanos* decision, but undermines the consistency and clarity the Agencies should be providing, preferably through rulemaking. Moreover, that certain districts are claiming that they can disregard the Guidance because it is not legally binding demonstrates the degree of confusion and legal risk clouding the Agencies' extensive CWA regulatory program. This regulatory overextension and confusion will continue unless this Court reviews the Court of Appeals' decision.

C. Significant Nexus Must Be "Significant."

The Agencies have, since this Court decided *Rapanos*, heavily employed the "significant nexus" label to assert CWA jurisdiction (as an alternative to using the "relatively permanent waters" label, discussed above). But the Agencies have eliminated "significant" from the "significant nexus" test described by Justice Kennedy, instead asserting jurisdiction over all waters that "have a more than speculative or insubstantial effect on" traditional navigable waters. Guidance at 10. The Agencies' misapplication of the "significant nexus" test has, similar to their misapplication of the "relatively permanent waters" test, sweeping and impermissible implications for CWA jurisdiction.

In his concurring opinion in *Rapanos*, Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The

wetlands must "*significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (emphasis added). Justice Kennedy explained that there must be "substantial evidence" showing the significance of the connection to traditional navigable waters. *Id.* at 786. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 784. A "mere hydrologic connection" between a wetland and a traditional navigable water will not suffice absent "some measure of the significance of the connection for downstream water quality." *Id.* Nor will speculation suffice. *Id.* at 786. Justice Kennedy criticized the Agencies and the lower courts for finding jurisdiction based on the "*potential* ability of the wetland to act as a sediment basin" and a likelihood that downstream areas would "see an increase in *possible* flooding." *Id.* at 785-86 (emphasis added).

The Agencies' Guidance turns Justice Kennedy's significant nexus test upside-down, allowing jurisdiction when the nexus between a wetland and a traditional navigable water is "more than speculative or insubstantial." *See* Guidance at 10. Moreover, the Agencies' Guidance does not establish the "measure of the significance" Justice Kennedy called for. Thus, the Agencies define "significant nexus" to mean anything "more" than what Justice Kennedy said was insufficient. But "more than speculative or insubstantial" is not the same as "significant." *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (the "commonly understood" meaning of significant is "important").

The Agencies' significant nexus determinations made in accordance with the Guidance are, predictably, deficient. A significant nexus determination made for wetlands in Clark County, Washington, begins with a statement that there is a surface hydrological connection to a traditional navigable water, moves to a recitation of routine wetland functions, and concludes that the wetlands impact a traditional navigable water. EPA and Corps, Memorandum to Assert Jurisdiction for NWS-2007-749-CRS (Oct. 2, 2007), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/Kennedy_N_RPW_NWS-2007-749-CRS.pdf (Clark County). *See also* EPA and Corps, Memorandum to Assert Jurisdiction for NWS-2007-435-NO (Aug. 29, 2007), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/Kennedy_N_RPW_NWS-2007-435-NO.pdf (Snohomish County). Completely absent is a discussion of the extent to which the functions exist or the degree to which they impact the water quality of traditional navigable waters. A statement that certain wetlands provide wetland functions is tautological. More is needed than just "any connection" or, as here, any function. There must be a showing of the "*measure* of the significance of the connection for downstream water quality" before it can be determined whether the nexus rises to the level of "significant." *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring) (emphasis added).

CONCLUSION

The public is confused, the circuits are split, and people are going to jail. For all of the foregoing reasons, the Court should grant the requested petition and clarify the meaning of "waters of the United States."

Respectfully submitted,

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September 22, 2008

APPENDIX

APPENDIX A

From: Blaine, Marjorie E SPL [Marjorie.E.Blaine @spl01.usace.army.mil]

Sent: Monday, July 23, 2007 3:48 PM

To: Amy.Moore@ElPaso.com; Angela Barclay; territorial.chuck@frontiernet.net; Clint Glass; Fred Phillips; Greg Santo; Allen W. Gross; Jennifer Christelman; Chris Cawein; Jill Himes; jim@harcuvarco.com; Jim Tress; Karl Taylor; K_Thicks@yahoo.com; kwhitman@westlandresources.com; LSmith@ epgaz.com; RVanommere@aol.com; pnzomo @comcast.net; Rion Bowers; Stephen E. Glass; Russell C. Wise; David Taylor; Bowers, Garth; Catesby Willis; Kofi Awumah; Janice Hughes; Ken Kertell; Todd R. Bremner; SBreslin@tep.com; Avant, Paul; Larkin, Bob; PETER LIVINGSTON; Corby Lust; Chris Rod; D Warren; Don N. Anderson; Eric Koster; Gene_Rogge@URSCorp.com; Josh McEnany; kristin myers; Kim_Bidle@URSCorp.com; Martin, Marcie; Zeller, Mike -- ISG; Swaim, Phil; Tanner, Rene; Robert Pape; sce@corralesengineering.com; Udaya Prakash

Subject: FW: Rapanos Guidance

Attachments: Final JD Form.doc

One additional, important item I forgot to mention. My apologies....

The Corps is still looking at every wash that even MIGHT have been jurisdictional before the Rapanos guidance. The only things that are clearly not jurisdictional are swales, erosional features, and

manmade ditches constructed entirely in uplands which do not intersect, drain, or are not tributary to any water of the U.S. Since there is no definition of "small wash", we would like to look at everything and your proposed SN determination. So even really small washes . . . one foot wide which have an OHWM should be considered in your submittals. They will be determined to be jurisdictional or not on a case-by-case basis depending on whether they have a SN to a TNW.

Thanks again.

Marjorie

From: Blaine, Marjorie E SPL

Sent: Monday, July 23, 2007 12:34 PM

To: 'Moore, Amy M (Amy)'; Angela Barclay (cottonwood_environmental@cox.net); (territorial.chuck@frontiernet.net); 'Clint Glass'; 'Fred Phillips'; 'Greg Santo'; 'Allen W. Gross'; Jennifer Christelman; 'Chris Cawein'; 'Jill Himes'; (jim@harcuvarco.com); 'Jim Tress'; Karl Taylor (Karl.Taylor@co.mohave.az.us); K_Thicks@yahoo.com; kwhitman@westlandresources.com; LSmith@epgaz.com; 'RVanommere@aol.com'; 'pnzomo@comcast.net'; 'Rion Bowers'; 'Stephen E. Glass'; 'Russell C. Wise'; 'David Taylor'; 'Bowers, Garth'; 'Catesby Willis'; 'Kofi Awumah'; 'Janice Hughes'; 'Ken Kertell'; 'Todd R. Bremner; 'SBreslin@tep.com'; 'Avant, Paul'; 'Larkin, Bob'; 'PETER LIVINGSTON'; 'Corby Lust'; 'Chris Rod'; 'D Warren'; 'Don N. Anderson'; 'Eric Koster'; 'Gene_Rogge@URSCorp.com'; 'Josh McEnany'; 'kristin myers'; 'Kim_Bidle@URSCorp.com'; 'Martin, Marcie'; 'Zeller, Mike — ISG'; Swaim, Phil; 'Tanner, Rene'; 'Robert Pape'; 'sce@corralesengineering.com'; 'Udaya Prakash'

Subject: FW: Rapanos Guidance

I wanted to provide you all with a brief update on the Rapanos Guidance and the Corps' implementation of this guidance.

If you are working on delineations for Pima County, we are currently gathering the documentation to determine if the Rillito River and/or the Santa Cruz River are TNWs. We intend to meet on July 31st to

make a determination that will go to Headquarters for approval. We are hoping to receive approval from HQ quickly--within a couple of weeks. Therefore, it will be difficult for us to verify any jds until we know what the approved TNWs are for Pima County. Obviously, if you submit a jd with a significant nexus (SN) determination to the Colorado River, the results might be very different than if you are making a SN determination to the Rillito or Santa Cruz River. As a Branch, Arizona is also looking at the Virgin, Verde, Salt, Gila, San Pedro, and New Rivers as well as several creeks (i.e. Skunk Creek in Maricopa County). All of these will be submitted to HQ at one time for their approval.

EPA has indicated to us that the requirement for an RPW to have three consecutive months of flow annually is guidance only. They have indicated that any watercourse which has "predicatable, seasonal flow" could be considered an RPW. They have also stated that once a watercourse is determined to be an RPW, everything downstream of it would be jurisdictional.

When submitting jds, please be sure to submit a cd with all information or a third copy of the entire submittal for transmittal to EPA. If you submit a cd, please try to keep the submittal to 3 MB so I can transmit it electronically. Attached is an MS Word doc of the new jd form. You are welcome to complete it and submit it to us as it will help you define the information you need and will concisely help to submit it to us. It will also help us as it will expedite our completion of the form; please note, however, that we are under no obligation to use the form you submit if we disagree with it. There are directions for completing the form starting on page 47 of the

guidebook. The link to all the Rapanos guidance (including the guidebook) is:

http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm

When you submit hydrology information, please keep it concise. We don't have the room to store 2-inch binders of drainage reports. For SN determinations, we are looking for volume, duration, frequency of flow (please provide the Q100); size of drainage area; distance to TNW; average annual rainfall; physical, chemical, biological significance to the closest TNW.

Please feel free to share this information. My apologies to anyone I might have missed that you forward this to.

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<<Final JD Form.doc>>

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Subject: Rapanos Guidance

As many of you have heard by now, the Rapanos Guidance was announced by the Corps and EPA a short time ago. We will be receiving copies of the guidance about the same time as you do; we've been given no advance copies. The Los Angeles District Regulatory Division will be meeting today to discuss the guidance, in general. Please feel free to pass this email on to anyone else in your office or other consultants or your clients.

The guidance is evidently quite lengthy and it will take us some time to fully understand it and to also implement a procedure for verifying jds within the Los Angeles District and also the South Pacific

Division so we are consistent. It appears, though, that there will be some requirement for EPA approval of jds made under "significant nexus" and so we will also need time to sort that out with EPA Region IX as to the procedure.

We appreciate your patience to date on this lengthy process and hope that you see a light at the end of the tunnel. We must ask for your continued patience for just a few weeks more as we digest the guidance and determine the best implementation for it within our District and Division and with EPA. We anticipate that you can begin submitting jds within three weeks and ask that you, again, be patient with us until that time. I will send out another email when we are ready to begin accepting jds. Our first priority after the next few weeks is to verify the jds under the new guidance that we've been holding for the last 10-12 months. Then we will begin to review new jds.

If you have recently submitted a jd and asked us to do it under pre-Rapanos guidance as your client was willing to take the risk of having it redone, we will be reviewing those under the guidance to be received today. We will also be required to review any NWP PCNs that do not already have jds under the new guidance so if you planned to submit a NWP PCN shortly, we would appreciate your patience in that as we will not be able to process and issue the NWP verifications until we have our district implementation in place.

This is going to be a learning process for us all and I believe the review time for jds is going to be significantly longer until we get all the kinks ironed out and the backlog addressed. We truly appreciate your patience and are happy to answer any questions or assist you in any way we can. Please feel free to

call or email me if you have questions but my knowledge on this guidance will be minimal at this time. I will also be out of the office from June 8th-June 18th attending to family matters of urgency. I expect upon my return I will be able to fully assist you with any questions and then I will advise you when we are ready to accept jds. Again, that should be within just a few weeks.

Thank you all very much. I look forward to working with you in the future and please advise your clients we will do the best we can.

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No. 08-223

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MCWANE, INC., ET AL.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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September 22, 2008

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INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this amicus curiae brief supporting the United States as petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulation under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and has witnessed numerous situations where federal regulators have exercised authority beyond the CWA's limits.

This case is important to amicus because it involves the scope of the jurisdiction of the federal government over certain waterbodies under the CWA. Assertions of Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") permitting control over private property has had a significant impact on the development plans of NAHB's members throughout the nation. Many members have been

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

denied the economic benefits that result from development, as a result of the CWA's complicated and arcane permitting processes.

NAHB frequently participates as a party litigant and amicus curiae to safeguard the rights and interests of its members. NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as amicus curiae or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE FOR THE SAME REASONS THAT IT SHOULD ACCEPT REVIEW IN *UNITED STATES V. LUCAS*.

On June 2, 2008, petitioners in *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), *pet. for .cert. filed*, (June 2, 2008) (No. 07-1512), sought review of the Fifth Circuit's decision upholding their multi-year criminal convictions for, among other things, violations of sections 402 and 404 of the CWA. On July 7, 2008, NAHB and the Chamber of Commerce of the United States of America filed an amici curiae brief in support of the *Lucas* petitioners, advocating for a grant of certiorari. Br. of the National Association of Home Builders, *et al.*, as Amici Curiae Supporting Pet'rs, *Lucas v. United States*, No. 07-1512 (S. Ct. filed July 7, 2008) ("NAHB *Lucas* Amici Br.").

At their core, the petitions in both *Lucas* and the case at bench seek clarification of *Rapanos v. United States*, 547 U.S. 715 (2006), a 4-1-4 decision where a majority of this Court could not agree on an overarching test for jurisdiction of statutory "navigable waters" under the CWA. For the reasons that NAHB believes certiorari should be granted in *Lucas*, the Court should also accept *McWane* for review.

The very same split among the circuits, with an analysis of the very same universe of appellate decisions, discussed by NAHB in *Lucas* is again urged here by the United States as necessitating this Court's intervention. Compare NAHB *Lucas* Amici Br. at 4-10 with Cert. Pet. of the United States, *United States v. McWane*, No. 08-223 (S. Ct. filed Aug. 21, 2008) ("*McWane* Cert. Pet."), at 16-19. Indeed, in *Lucas* NAHB identified the court of appeals decision *in this case* as one of the main progenitors for the judicial disarray on the extent of the CWA's scope. NAHB *Lucas* Amici Br. at 7-8 (discussing *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007)). Both cases call for direction from this Court on the same issue.

Furthermore, questions about whether *Marks v. United States*, 430 U.S. 188 (1977), can be used to discern a holding from the fragmented *Rapanos* opinions,[2] is equally raised by both NAHB in *Lucas*

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[2] In *Rapanos*, the Justices who concurred in the judgment announced two tests for determining CWA jurisdiction. The four-Justice plurality established the "relatively permanent

and the United State here as justification for a certiorari grant. Compare NAHB *Lucas* Amici Br. at 4-8 with *McWane* Cert. Pet. at 19-24. NAHB's submission in *Lucas* isolated the "narrowest grounds of concurrence" (*Marks*, 430 U.S. at 193)) that can be identified in the varying *Rapanos* opinions to discern a holding. See NAHB *Lucas* Amici Br. at 11-17 (identifying areas of consensus among Justices Scalia's and Kennedy's *Rapanos* opinions). If articulated in a single opinion, these areas of common ground would provide the regulated community and agency officials with proper and predictable CWA jurisdictional determinations in the field. Such a unified voice from the Justices is critical to resolution of the questions presented in both *Lucas* and *McWane*.

As NAHB offered in *Lucas*, the genesis of many problems with the CWA's implementation stem from a misunderstanding of the basic terminology used to define its jurisdictional scope. NAHB *Lucas* Amici Br. at 17-18. Confusion over the extent of "navigable waters," "the waters of the United States," "navigable waters of the United States," "traditional navigable waters," "navigable-in-fact waters" — all related terms, but each with distinct meanings and separate geographic reaches — has predictably yielded conflict in the courts and imprecision in agency determinations. *Lucas*, just like *McWane*, provides an appropriate vehicle for the Court to finally issue an opinion that moves all stakeholders closer to a shared understanding of these critical phrases. Unless all

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waterbody" test (547 U.S. at 742), while Justice Kennedy created the "significant nexus" test. *Id.* at 779-780.

interested parties are on the same page as to the meaning of these fundamental terms, clarity on the CWA's scope will only linger as a remote aspiration.

In particular, NAHB urged for clarification of the key phrase "traditional navigable waters." NAHB *Lucas* Amici Br. at 18-23. In *Rapanos*, both the plurality and concurrence acknowledged that a finding of CWA jurisdiction is inextricably linked to traditionally navigable waters ("TNWs").[3] However, in *Lucas*, the district court's jury instruction equated "navigable-in-fact" waterbodies with TNWs. *Lucas*, 516 F.3d at 323-24. The two are not interchangeable. Reading *The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) together, the Court stated that a "navigable-in-fact" waterbody only qualifies as a TNW where it further forms, in its ordinary condition by itself or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries. NAHB *Lucas* Amici Br. at 20-23. With the understanding that a TNW determination serves as the foundation of any CWA analysis — but also with the recognition that all Justices believe the CWA reaches more than TNWs

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[3] Justice Kennedy stated that that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and *navigable waters in the traditional sense*." *Rapanos*, 547 U.S. 715 at 779 (Kennedy, J., concurring) (emphasis added). Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to a *traditional interstate navigable waters*)...." *Id.* at 742. (emphasis added).

(NAHB *Lucas* Amici Br. at 12) — NAHB again presses the Court to clarify the important distinction between TNWs, navigable-in-fact waters, and waters subject to federal agency authority under the CWA.

In its petition here, the United States references NAHB's *Lucas* Amici Brief and highlights the importance of issues regarding the CWA's scope to members of the regulated community. See *McWane* Cert. Pet. at 30-31, n. 10. However, after acknowledging that the *Lucas* petition likewise questioned the appropriate standard for determining the Act's scope under the fractured *Rapanos* decision, the United States reached the specious conclusion that *McWane* "provides a more suitable vehicle for determining CWA coverage." *Id.* at 31 n.10. While *McWane* may provide a superior vehicle for overturning a case lost by the United States at the Eleventh Circuit, it is no more appropriate than *Lucas* for resolving the fundamental issue of the "correct test" for determining the CWA's jurisdictional reach.

People are *in jail* in *Lucas*.[4] Surely from their perspective, their petition provides the better vehicle for this Court's review. The *Lucas* petition calls into

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[4] Defendant Robert J. Lucas was sentenced to serve 108 months in jail, 36 months of supervised release and ordered to pay $19,100 in penalties. Judgment, *United States v. Lucas*, No. 04-cr-60, (S.D. Miss. Dec. 21, 2005) (docket no. 223). Lucas's co-defendants were each sentenced to serve 87 months in jail, 36 months of supervised release and ordered to pay $15,000 and $3,300 in penalties, respectively. *Id.* (docket no. 219, 221). Lucas's two companies were sentenced to 60 months probation and ordered to pay a total of $5.3 million in fines and assessments. *Id.* (docket no. 215, 217). Defendants together

play the issue of whether the rule of lenity should be applied to construe the obvious ambiguities of the phrase "navigable waters" against federal inclinations toward criminal enforcement and imprisonment. See NAHB *Lucas* Amici Br. at 24-26.[5] Because uncertainty remains over whether Congress intended to extend the CWA's scope to the wetlands on the *Lucas* petitioners' property, amici asked this Court to resolve any question of the Act's coverage in Lucas's favor.

In sum, NAHB respectfully submits that the Court should grant certiorari in this matter as it should in *Lucas*.

II. THIS CASE AND *LUCAS* SHOULD BE CONSOLIDATED.

NAHB suggests that the Court consolidate *Lucas* and *McWane*. Case consolidation "is permitted as a

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were sentenced to pay an additional $1,407,400 in restitution, which is for 454 mitigation credits from the Old Fort Bayou Mitigation Bank located in Jackson, MS or any other appropriate mitigation bank near Jackson County, MS. *Id.* (docket no. 215, 217, 219, 221, 223).

[5] This Court has stated that two rationales support lenity as a canon of statutory construction. The first is that individuals are entitled fair warning that particular activities will subject them to criminal penalties. See, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990); *Liparota v. United States*, 471 U.S. 419 U.S., 427 (1985), *United States v. Bass*, 404 U.S. 336, 346 (1971). The second is that legislatures, rather than courts, should be responsible for defining precisely which actions are crimes. See, *e.g.*, *Crandon*, 494 U.S. at 158 (1990); *Moskal v. United States*, 498 U.S. 103, 131 (1990); *Muscarello v. United States*, 524 U.S. 125, 150 (1998); *Bass*, 404 U.S. at 348 (1971).

matter of convenience and economy in administration." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). This Court consolidated *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) and *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004) to achieve those purposes. Both cases dealt with the same issue of law — interpreting "navigable waters" under the CWA — and this Court consolidated them and filed one decision addressing both.

Pursuant to Rule 27.3, this Court should similarly order the consolidation of *McWane* and *Lucas*. Parties in both cases were criminally prosecuted for the unpermitted discharge of pollutants into statutory "navigable waters." They appealed their convictions in the lower courts, arguing that their alleged discharges were beyond regulatory control because they impacted nonnavigable tributaries that were neither themselves navigable nor connected to navigable waters. The outcome of both cases ultimately turned on whether the jury instructions embodied the appropriate *Rapanos* jurisdictional waters test. Because the facts and questions of law are substantially identical and a clear resolution of the issues would promote judicial economy by alleviating confusion regarding CWA coverage, consolidation of *Lucas* and *McWane* is appropriate.

CONCLUSION

The United States' petition is the ninth request that this Court has received since it decided *Rapanos*, asking for additional instruction on the scope of "navigable waters." See NAHB *Lucas* Amici Br. at

10, n. 6. That chorus will only grow louder from government officials and the regulated community until the Court issues guidance.

For all the foregoing reasons, certiorari should be granted in both *McWane* and *Lucas* and the cases should be consolidated.

September 22, 2008

Respectfully submitted.

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APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547

U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S. Ct. 750 (2008); *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); *Winter v. Nat. Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 128 S. Ct. 2964 (2008) (No. 07-1239); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).

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In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

McWANE, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. § 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner United States of America.[1]

PLF was founded thirty-five years ago and is recognized as the largest and most experienced nonprofit legal organization of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, and free enterprise. PLF attorneys have litigated dozens of cases nationwide on the scope and application of federal environmental statutes, including the Clean Water Act. PLF attorneys represented John Rapanos before this Court in *Rapanos v. United States*, 547 U.S. 715 (2006), the interpretation of which is the subject of the present Petition. PLF attorneys also have participated in virtually every circuit court case interpreting the *Rapanos* decision. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006);

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006). PLF submits that this litigation experience on the subject of the Petition will provide a useful additional viewpoint to assist the Court in its consideration of this case.[2]

SUMMARY OF ARGUMENT

In *Rapanos*, a five-Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the CWA based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four-Justice plurality interpreted the CWA narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands indistinguishable from these waters. But Justice Kennedy, concurring in the judgment, interpreted the CWA broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters. 547 U.S. at 767.

The federal Circuit Courts of Appeals are split on how to apply this Court's *Rapanos* decision. The First Circuit expressly rejected the "significant nexus" test as solely controlling and held that Clean Water Act jurisdiction could be extended to inland waters based on either Justice Kennedy's concurrence or the *Rapanos* plurality's test. *United States v. Johnson*, 467 F.3d 56. In *United States v. Lucas*, the Fifth Circuit

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[2] While Amicus supports the Petition for purposes of clarifying both *Marks* and *Rapanos*, *see* below, Amicus does not support Petitioner's effort to have this Court overturn the lower court's decision that Petitioner did not establish federal CWA jurisdiction over the properties in question.

declined to adopt any controlling opinion in *Rapanos*, instead holding that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." 516 F.3d 316, 326 (5th Cir. 2008). The Seventh Circuit, in *Gerke*, and the Ninth Circuit, in *N. California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), have decided like the Eleventh Circuit in this case that the "significant nexus" test is controlling.

These circuit rulings conflict with this Court's analysis in *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Marks*, this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (emphasis added). Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* consists of the plurality position, because it is a logical subset of the "significant nexus" test. But, as is the case with applying *Rapanos*, there is general disagreement among the circuit courts over how (and when) to apply *Marks*. Therefore, review by this Court is necessary not only to resolve the conflict among the circuits as to enforcement of the Clean Water Act, but also to clarify this Court's interpretive rules for all split decisions.

REASONS FOR GRANTING THE WRIT

I

CIRCUITS ARE SPLIT ON HOW TO APPLY THIS COURT'S DIVIDED OPINIONS

A. *Marks v. United States*

In *Marks*, this Court was clear: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). Although this rule has been difficult to apply, *see below*, this Court has established *Marks* as the only sanctioned approach for interpreting its split decisions. *See In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It was derived from this Court's decision in *Gregg*, 428 U.S. 153. *Gregg* examined *Furman v. Georgia*, 408 U.S. 238 (1972), a case presenting a constitutional challenge to a Georgia death penalty statute. In *Furman*, five Justices joined in the judgment of the Court and concluded that the death penalty as administered in Georgia was unconstitutional. This Court, however, split on the legal rule to support its conclusion. Two Justices who concurred in the judgment contended that capital punishment is unconstitutional in all cases, whereas the remaining Justices in the majority concluded only

that the particular death penalty law at issue was unconstitutional, leaving open the possibility that other death penalty laws may pass constitutional muster.

In *Gregg*, this Court anticipated the *Marks* rule through its reading of *Furman*:

> Since five Justices wrote separately in support of the judgments in Furman, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .

Gregg, 428 U.S. at 169 n.15. Since the narrowest of the *Furman* majority opinions concluded that only the death penalty law at issue was unconstitutional, this Court in *Gregg* held that the split *Furman* opinions should not be interpreted to hold that the death penalty always violates the Constitution. *Id.* at 169.

In *Marks* itself, this Court was presented with the question of whether certain materials, determined by the lower courts to be obscene, enjoyed First Amendment protection. This Court concluded that the pertinent legal rule was to be found in its split decision in *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which six Justices reversed a lower court's judgment that a novel deemed obscene was not protected under the First Amendment. Three Justices in the *Memoirs* majority agreed with the lower court that obscene materials are not constitutionally protected, but rejected as too lax the lower court's standard for constitutionally unprotected obscenity. *See id.* at 418-19 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.).

Two other Justices in the *Memoirs* majority joined in the judgment on the grounds that, because the First Amendment protects obscenity however defined, the novel in question was constitutionally protected. *Memoirs*, 383 U.S. at 421 (Black, J., concurring); *id.* at 433 (Douglas, J., concurring). A sixth Justice also concurred, writing that all forms of obscenity save hardcore pornography are protected under the First Amendment. *Id.* at 421 (Stewart, J., concurring).

The *Marks* Court concluded that the *Memoirs* three-Justice rule, imposing a heightened standard for regulation of obscenity, was the decision's narrowest grounds because the opinions giving a First Amendment shield to all forms of obscenity provided a much broader protection. *Marks*, 430 U.S. at 193. *Marks* thus gave birth to the "logical subset" analysis. *See Johnson*, 467 F.3d at 63-64 (citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). That is, a given rationale for a split opinion is a decision's narrowest grounds, and thus controls, if it is a "logical subset" of the other rationales for the decision:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992). Thus, every statute that passes strict scrutiny also survives rational basis review, but the converse is not true. Therefore, the opinion applying strict scrutiny would comprise this example's narrowest grounds under *Marks*.[3]

B. Courts Do Not Uniformly Apply *Marks* and Its Narrowest Grounds Analysis

In several substantive contexts, both lower courts and this Court have demonstrated difficulty (or reluctance) in applying *Marks* to fractured decisions. The result, as Chief Justice Roberts wrote in *Rapanos*, is that "[l]ower courts and regulated entities [ ] have to feel their way on a case-by-case basis." 547 U.S. at 758. Such an approach is the antithesis of the uniform administration of justice this Court's decisions should engender.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs.*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit interpreted this Court's split decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*. In that case, this Court held that enhancements to the lodestar for attorneys' fees under the Clean Air Act, for assuming the risk of nonpayment, were improper. 483 U.S. 711 (1987). A plurality of four Justices contended that such

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[3] As Petitioner correctly points out in its Petition for Writ of Certiorari at 23 n.8, "the *Marks* test is designed to identify a legal principle," and not to "gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce an overall result."

enhancements always are improper, *id.* at 729-30, whereas Justice O'Connor, concurring separately, argued that such enhancements are not always improper, but that they were in the specific case under review, *id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). The Third Circuit, applying *Delaware Valley*, concluded that because the dissent in that case would have approved of enhancements generally—and because Justice O'Connor approved of enhancements under certain circumstances—a majority of this Court in *Delaware Valley* would hold that enhancements are proper if Justice O'Connor's standards were met. *Student Public Interest Research Group*, 842 F.3d at 1451.

In so deciding, the Third Circuit never discussed *Marks*. Under *Marks*, the "narrowest grounds" of *Delaware Valley* would be Justice O'Connor's opinion, but only for the proposition that, under the circumstances present in that case, enhancements are improper. Importantly, *Marks* would not authorize a rule from the other side of the *Delaware Valley* coin; that is, a rule that would affirmatively approve of enhancements where Justice O'Connor's conditions are met. That conclusion is a function of *Marks*'s mandate that a court interpreting this Court's split decision must look *only* to the opinions of the Justices concurring in the opinion, *Marks*, 430 U.S. at 193, and therefore must ignore any dissents. As the Eleventh Circuit held in this case, looking to dissenting Justices is "inconsistent with *Marks*" because under that case, the opinion of dissenting Justices "is of no moment."

United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).[4]

Exclusive attention to the opinions of Justices joining in the judgment is a necessary practice in any split decision analysis, because the views of dissenting Justices play no legitimate interpretive role. This is true as a matter of fidelity to *Marks* and as a necessary tribute to the foundations of Article III jurisprudence. Reliance upon dissenting Justices' views is unfounded because federal courts may only expound the law to the extent that their opinions are tied to a judgment; that is to the extent that the courts resolve an actual "Case or Controversy." *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (Federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.") (citation omitted). Given that the views of dissenting Justices have no effect, by definition, on the Court's disposition of an actual case or controversy, it follows that their views as to the controlling rule of law are without binding power. *See Robison*, 505 F.3d at 1221 ("We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision.").

Among the most conspicuous examples of a split decision applied differently by various circuits is this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*,

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[4] Amicus is cognizant of Petitioner's support for incorporating dissents into analyses of this Court's plurality decisions, *see* Petition for Writ of Certiorari at 24-25, and disagrees with Petitioner's argument in this regard.

this Court examined the constitutionality of a medical school admissions program that set aside admissions slots for members of racial minorities. As this Court wrote twenty-five years later in a decision to clarify *Bakke*'s fractured decision:

> The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Id., at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Id., at 408, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever.

Grutter v. Bollinger, 539 U.S. 306, 322 (2003).

In the midst of *Bakke*'s splintered opinions, Justice Powell's concurrence that race-conscious admissions programs, if designed to mold a racially diverse student body--an opinion joined by no other Justice—became "the touchstone for constitutional analysis of race-conscious admissions policies." *Id.* at 323 (citing *Bakke*, 438 U.S. at 311). Yet it was not

universally applied as such in the circuit courts. In the Eleventh Circuit, for example, the court held, over two decades after *Bakke*, that Justice Powell's diversity concurrence was not the holding of this Court, and thus did not control. *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001). As this Court noted in *Grutter*, the Fifth Circuit similarly disregarded Justice Powell's concurrence as controlling, *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000), while courts such as the Ninth Circuit held the diversity rationale to be governing law, *Smith v. University of Washington Law School*, 233 F.3d 1188, 1199 (9th Cir. 2000). *See Grutter*, 539 U.S. at 325.

The judicial, political, and social consequences of this divided application of a fractured decision resulted in one of the most contentious issues in daily American life, and necessitated this Court's revisiting of the matter in *Grutter*. Even then, though, this Court did not decide the issue pursuant to *Marks*, writing that the Court "do[es] not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*," because it was not "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Grutter*, 539 U.S. at 325 (quoting *Nichols v. United States*, 511 U.S. 738, 746 (1994)).

With admissions such as this one from even this Court, it is not surprising that lower courts sometimes are reluctant to apply *Marks* at all. Several circuits have reacted to their queasiness over *Marks* by ignoring its rule and adopting an ad-hoc approach to interpreting this Court's fragmented decisions. This approach involves divining which grounds might, in

theory, find favor with five Justices. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." So too the Ninth Circuit: "We need not find a legal opinion which a majority joined, but merely a 'legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'"). *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

Some courts attribute their failure to strictly adhere to *Marks* to that case's lack of function in certain factual settings. This Court, in *Grutter*, wrote that there are instances where application of *Marks* is "more easily stated than applied to the various opinions supporting the result," 539 U.S. at 325. As the D.C. Circuit in *King v. Palmer* explained, *Marks* is most easily applied where one opinion can "represent a common denominator of the Court's reasoning" and "embod[ies] a position implicitly approved by at least five Justices who support the judgment." 950 F.2d at 781. But, when

> one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow

> that approach with controlling force, no matter how persuasive it may be.

Id. at 782.

An illustration of *Marks*'s aptness in some settings, as opposed to others, stems from this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In *Eastern Enterprises*, this Court held that the retroactive application of the Coal Industry Retiree Health Benefit Act to Eastern Enterprises was unconstitutional. A plurality of Justices, in an opinion authored by Justice O'Connor, held that the Act effected a taking, and reached that conclusion by applying the multi-factor regulatory takings test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Eastern Enterprises*, 524 U.S. at 529. Justice Kennedy, concurring separately, agreed that the Act was unconstitutional as applied, but contended that the result flowed from a due process analysis, and not from a takings framework. 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

Lower courts were faced with the questionable applicability of *Marks*, because neither the plurality's takings test, nor Justice Kennedy's substantive due process test, is a logical subset of the other. At least two circuits resolved this dilemma by applying *Eastern Enterprises* only in situations where plaintiffs "stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence," in practice limiting this Court's decision to its facts. *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999); *see also Mary Helen Coal Corp. v. Hudson*, 164 F.3d 624 (4th

Cir. 1998) (judgment for appellant because case was "materially indistinguishable from *Eastern*"). Other lower courts disposed of cases based on hypothesizing which holding might potentially find the support of five of this Court's Justices. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (citing various authorities for the proposition that "regulatory actions requiring the payment of money are not takings"). In sum, courts' difficulty in applying *Marks* to a split decision not amenable to a Venn Diagram compelled the courts to disregard the *Marks* test altogether.

This uneasiness may well be valid, and numerous commentators have written to that effect and offered either glosses on *Marks* or wholesale substitutes for this Court's rule. *See* Melissa M. Berry, et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 Va. J. Soc. Pol'y & L. 299, 333-40 (2008); Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U.J. L. & Pol'y 261, 280-86 (2000); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 447-57 (1992); Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 769-74 (1980). But whatever the merits of these criticisms of *Marks*, the fact remains that *Marks* is this Court's controlling decision for interpreting the Court's split decisions. Like this Court's other controlling opinions, *Marks* does not permit lower courts to disregard its holding where those courts think another interpretive tool would be more appropriate. This Court should

grant the Petition in this case either to reaffirm and clarify its commitment to *Marks* with regard to any of its split decisions, or to fashion a new interpretive rule for dealing with such opinions.

II

THIS COURT SHOULD GRANT THE PETITION TO CLARIFY ITS DECISION IN *RAPANOS*

A. There Are Multiple Post-*Rapanos* Conflicts in the Lower Courts

Post-*Rapanos* CWA cases are the most recent example of confusion over how to apply this Court's split decisions. The result is that whether a person may make productive use of his land, and whether he faces criminal penalties including prison time for CWA violations, depends on the federal circuit in which he resides.

In *Gerke*, which also involved a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule and thus misapplied this Court's test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

464 F.3d at 724 (citations omitted). In the Seventh Circuit, as in the Eleventh Circuit opinion in this case, the "significant nexus" standard controls.

The Seventh Circuit's adulterated version of the *Marks* rule allowed the court to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find the five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the CWA. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. Nevertheless, under *Marks*, finding the support of five Justices is not the controlling standard.

The First Circuit, in *United States v. Johnson*, found it curious that the *Gerke* court equated "narrowest ground" with the opinion "least restrictive of federal authority." 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence, and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the First Circuit stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)." *Id.* This, according to the court, is because "that

ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In conclusion, and in contrast with the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit in *Johnson* opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases." *Id.* The court held that the "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at 64. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of Justice Kennedy's standard. The First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit ultimately brushed aside *Marks*, writing that it "does not translate easily to the present situation, *id.* at 64, and held that "[t]he federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 60.

In *N. California River Watch*, the Ninth Circuit adopted the approach of the Seventh Circuit, and anticipated the Eleventh Circuit's opinion in the present case, by holding that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos*. And in the most confused of all post-*Rapanos* circuit court cases, the Fifth Circuit in *Lucas* applied the

jurisdictional tests of the *Rapanos* plurality, the concurrence, *and* the dissent as if they were all of equal validity without so much as a mention of the *Marks* rule. It then declared that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." 516 F.3d at 326. This "neighboring" test is not found anywhere in the *Rapanos* decision. The Fifth Circuit introduced its own standard and conjured an additional conflict among the circuits. This conflict creates a substantial disparity among the circuits in the enforcement of the Clean Water Act, one that requires reconciliation by this Court.

B. Practical Concerns of Fairness and Justice Warrant Granting the Petition

Since the promulgation of the Clean Water Act, the Army Corps of Engineers and the Environmental Protection Agency have failed to follow a consistent jurisdictional test for regulated wetlands. A report from the General Accounting Office confirms that the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs To Evaluate Its District Office Practices In Determining Jurisdiction* 3 (Feb. 2004) (GAO Report).[5]

In addition to interdistrict inconsistencies, the GAO Report concluded that even corps staff working in

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[5] *Available at* www.gao.gov/new.items/d04297.pdf (last visited Sept. 13, 2008)

the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. As *Rapanos* and its progeny demonstrate, those decisions become the basis for multimillion dollar fines and criminal prosecution.

A basic element of the rule of law is that a person must be able to know beforehand, with some reasonable degree of certainty, what acts the law proscribes. If a law "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *Hill v. Colorado*, 530 U.S. 703, 732 (2000), the law violates the certainty requirement inherent in Due Process of Law. As such, the right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the Clean Water Act program is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands"as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land that no reasonable

person would conclude is subject to federal jurisdictional control as a wetland.

This Court long has held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the confusion among the circuits in post-*Rapanos* cases, and the inherent chaos of the Clean Water Act enforcement regime, provide no such clarity. This Court should grant the Petition and resolve this conflict, engendered by this Court's split decision in *Rapanos*, by cabining federal power in a manner appropriately respectful of the individual's fundamental constitutional rights.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

DATED: September, 2008.

Respectfully submitted,

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No. 08-223

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF PETITIONERS IN NO. 07-1512 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos* v. *United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

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INTERESTS OF AMICI CURIAE

Amici are the petitioners in the pending case of *United States* v. *Lucas*, No. 07-1512.[1] As the United States recognizes in its petition (at 30 n.10), *amici's* petition presents the same essential issue that the United States presents here: specifically, which of the alternative standards articulated in *Rapanos* v. *United States*, 547 U.S. 715 (2006), governs the lower courts in determining the extent of federal jurisdiction under the Clean Water Act (CWA).

In addition to the *Marks* issue presented in both petitions, however, *amici* have also presented a separate question that would allow the Court to articulate the proper interpretation of whichever of the *Rapanos* standards the Court selects. And *amici's* case involves the scope of federal jurisdiction, not over perennially flowing streams, as in this case, but over wetlands—an area of far greater practical and legal importance.

Unlike the respondents in this case, moreover, the individual *amici* are currently serving prison terms based upon the lower courts' misinterpretation of the Clean Water Act and each of the standards articulated in *Rapanos*. As a direct result, one of the individual *amici*—Robbie Wrigley—is now being deprived of the opportunity to raise her young son to adolescence. And the other two individual *amici*—Robert Lucas and M.E. Thompson—are being deprived of the

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[1] The parties have consented to the filing of this brief. Under Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to preparation or submission of this brief.

opportunity to spend their sunset years with family and friends. *Amici* therefore have a powerful interest in helping this Court provide needed guidance to lower courts—including those that have previously addressed the *Lucas* case—in determining the extent of federal jurisdiction under the Clean Water Act, particularly in the wetlands context.

ARGUMENT

As noted, the Government here seeks certiorari to determine how to interpret this Court's fractured decision in *Rapanos*, while the *Lucas* petitioners seek certiorari on that question as well as the broader question of *how* whichever standard the Court selects should be understood and applied. For that and other reasons discussed in Section I below, it makes sense for the Court to grant both petitions and consider them in tandem. Alternatively, as explained in Section II (and in the attached reply filed in support of *amici*'s petition), if the Court wishes to grant only one of these petitions, it should grant the *Lucas* petition, which provides a superior vehicle with which to resolve these difficult questions.

I. The Court should grant both petitions and consider them in tandem.

Amici agree with the Government that the *Marks* question presented in this case is the subject of an acknowledged and mature circuit conflict and is, in addition, an issue of profound practical importance—not only to the Government, but to businesses and other property owners throughout the nation. Indeed, according to the Environmental Protection Agency, as many as 300 million acres of wetlands blanket the United States, a third of them in the lower 48 states. EPA, *Wetlands: Status and Trends*,

http://www.epa.gov/OWOW/wetlands/vital/status.html (last updated Feb. 22, 2006). Depending on how the Government's jurisdiction is defined, moreover, it may exercise control over as little as 20 percent or as much as 90 percent of those wetlands. See Jon Kusler, Association of State Wetland Managers, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap* 6-8 (March 2004), at http://www.aswm.org/fwp/swancc/aswm-int.pdf. The extent of federal jurisdiction under the CWA is therefore a matter of critical importance in need of this Court's attention. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

The very importance of that issue, however, especially in the wetlands context, demands rejection of the Government's attempt to confine this Court's consideration to a single case arising in the quite different context of discharges directly into a perennial stream. The more sensible approach is to grant both petitions and hear them in tandem.

That approach is in keeping with the Court's past practice in analogous cases. Often during the past several Terms, when the Court has received two nearly simultaneous petitions raising similar or closely related issues, the Court has granted *both* petitions and considered the two cases in tandem. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (considering in tandem two cases involving the constitutionality of affirmative action programs); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) and *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003) (considering in tandem suits over whether the

Government violated fiduciary duties to two native tribes); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003) and *Ewing* v. *California*, 538 U.S. 11 (2003) (deciding in tandem two criminal cases involving California's "three-strikes" law); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) and *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005) (hearing in tandem two cases on the public display of the Ten Commandments); *Hammon* v. *Indiana*, 547 U.S. 813 (2006) and *Davis* v. *Washington*, 547 U.S. 813 (2006) (deciding in tandem whether statements in a 911 call and to police constituted testimonial statements under *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) and *Meredith* v. *Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007) (considering in tandem whether school policies aimed at racial desegregation were unconstitutional); *Gonzales* v. *Carhart*, 127 S. Ct. 1610 (2007) and *Gonzales* v. *Planned Parenthood*, 127 S. Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003 in tandem cases).

This procedure—hearing two closely related cases in tandem—has allowed the Court to consider the common issues more thoroughly and, ultimately, to give more comprehensive guidance to lower courts as to how to apply the legal standards the Court has adopted. For example, in *Grutter* and *Gratz*, both cases presented the broad issue of how to assess the constitutionality of affirmative action programs in higher education. Accordingly, the Court *could* simply have granted one of the cases and held the other pending the outcome of the first. But the two cases presented the affirmative action issue in two distinct contexts—one in the context of a law school admissions program that considered race subjectively, as

one of several factors; and the other in the context of a more objective undergraduate admissions program that automatically gave racial minorities a specific number of "points" based on the applicant's minority status. Given the differing factual settings in which the common issue arose, and the opportunity that both cases offered for providing guidance to the lower courts, the Court sensibly granted both petitions and heard the two cases in tandem.

Similar opportunities are offered by the two CWA cases now before the Court—this case and *Lucas*. Here again, the Court *could* simply grant one and hold the other pending decision in the first. But, as in *Grutter* and *Gratz* (and the other cases listed above), considering both cases together offers distinct advantages.

First, simultaneous consideration will allow the Court to more readily consider the scope of federal jurisdiction under the Clean Water Act in *both* of the contexts in which that issue arises most frequently—discharges into perennially flowing streams (as in this case) and the much more important context of discharges into wetlands—the context in *Lucas*. As another group of *amici* here have explained, "it is important to review CWA jurisdiction as it applies to *all* types of water bodies." Brief of *Amicus Curiae* American Farm Bureau Federation et al. (hereinafter "AFBF Brief"), No. 08-223, at 8 n.5.

Consideration of the jurisdictional question in the context of flowing streams alone—as the Government seeks here—would risk the adoption of a legal analysis that is both incomplete and less well suited to the wetlands context. For example, a decision in this case as to whether a perennially flowing stream con-

stitutes "waters of the United States" would not resolve the vexing and recurring issue of what it means for a *wetland* to be "adjacent" to navigable waters or their tributaries, and hence to constitute a "water of the United States" in its own right. See *Rapanos*, 547 U.S. at 728 (Scalia, J. plurality); *id.* at 760 (Kennedy, J. concurring); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Nor would this case give the Court an opportunity to resolve a key issue presented by the *Rapanos* plurality and concurrence, namely, how close and continuous a connection there must be between a wetland and a "relatively permanent" body of water. See AFBF Brief at 16-19; Brief of *Amicus Curiae* National Ass'n of Homebuilders and Chamber of Commerce of the United States, No. 07-1512, at 13-16.

For all these reasons, simultaneous consideration of both cases offers the best chance of ensuring that the Court fully appreciates both contexts and crafts its analysis in a way that is well suited to both.

Second, simultaneous consideration of both cases will allow the Court to more readily consider the views of two different courts of appeals as to the proper legal standard. As explained in the *Lucas* reply brief (Appendix A at 8a-9a), the courts of appeals in these two cases adopted very different interpretations of the *Rapanos* plurality. And, as shown in the *Lucas* reply (App. A at 11a-12a), the lower courts are in disarray as to the proper understanding of the concurrence's "substantial nexus" standard. Furthermore, especially in the wetlands context, the Government has construed the scope of this test extremely broadly, well beyond any reasonable construction of the *Rapanos* concurrence. See AFBR Brief at 7-8. Simultaneous consideration of both

cases will thus make it easier for the Court, in responding to these divergent views, to articulate exactly what its chosen standard means, and how that standard (or those standards) is to be applied.[2]

Third, as explained in the *Lucas* reply brief (App. A at 15a-16a), simultaneous consideration of both cases will ensure that at least one party before the Court is defending each of the three positions offered by the various *Rapanos* opinions. In this case, the Government will no doubt continue to urge adoption of the *Rapanos* dissent—*i.e.*, that federal jurisdiction exists when the standard adopted by *either* the plurality or the concurrence is satisfied. Similarly, because of the Eleventh Circuit's observation that the Government had satisfied the *Rapanos* plurality, but *not* the concurrence, the respondents here will have a powerful incentive to urge the adoption of the concurrence alone. Thus, if the Court were to grant review in this case but hold *Lucas*, none of the *parties* before the Court would likely defend the *Rapanos* plurality. By contrast, the *Lucas* petitioners intend to argue—based in part on the rule of lenity—that, at least in the criminal context, the *Rapanos* plurality should control.

In all of these respects, moreover, this case differs markedly from *Rapanos*, in which the Court consoli-

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[2] Indeed, even if the Government were correct that *Lucas* is not the most "appropriate" vehicle for resolving the *Marks* question presented in both petitions—because the Fifth Circuit did not choose a single legal standard—that alleged deficiency would be eliminated by granting both petitions, considering them in tandem, and then using *Lucas* (at a minimum) as a vehicle for determining the proper understanding of whichever standard the Court chooses. But in any event, the Government's premise is wrong: As explained in the *Lucas* reply (at 3-4), *Lucas* is a perfectly appropriate for resolving the *Marks* issue as well.

dated the two underlying cases rather than consider them in tandem. Unlike these cases, both of the cases at issue in *Rapanos* arose in the wetlands context. See 547 U.S. at 729-730. Unlike these cases, moreover, both of the underlying cases in *Rapanos* had been decided by a single circuit—the Sixth—under the same legal standard. And unlike these cases, the landowners there did not have divergent legal interests, and were not pressing for materially different standards.

For all these reasons, the Court should grant both this petition and the *Lucas* petition, and hear both cases in tandem.

II. If the Court nevertheless wishes to limit itself to one case, it should grant the *Lucas* petition.

If the Court decides to grant only one petition, however, it should grant the *Lucas* petition. As explained in greater detail in the *Lucas* reply (App. A), *Lucas* is a superior vehicle for resolving the difficult questions of the Government's jurisdiction in Clean Water Act cases.

First, unlike this case, *Lucas* (as noted) involves discharges into what the Government claims are jurisdictional wetlands, which this Court has recognized as raising significant constitutional questions. See *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality); *id.* at 782 (Kennedy, J., concurring); see also App. A at 7a-8a. As *Rapanos* attests, moreover, interpreting the CWA in the wetlands context is in general more challenging—not just for the courts, but for governmental and private actors alike. And, as noted, the wetlands context is far more important as a practical matter than the flowing streams context—given that

the former context potentially comprises hundreds of millions of acres of land. Accordingly, if the Court were to choose only one CWA case to hear and decide on the merits, it would make far more sense to choose a wetlands case than a flowing streams case.

Second, the Eleventh Circuit here only applied the *Rapanos* plurality, whereas the Fifth Circuit in *Lucas* purported to apply both the *Rapanos* plurality and concurrence. *Lucas*, therefore, offers this Court an opportunity to provide lower courts with guidance on the proper application of either of those standards. It also gives this Court the opportunity to address the proper standards to apply to residential septic systems—also an issue of enormous practical importance. See App. A at 8a-9a.

Finally, because the *Lucas* petitioners were sentenced to long prison terms based solely on the Government's expansive interpretation of the CWA, that case brings into sharper focus the substantial liberty and due process interests implicated by a decision on the scope of the federal government's jurisdiction. See Appendix A at 14a-15a. Those interests are more readily apparent in the *Lucas* case, in which, as noted, the Fifth Circuit's misinterpretation of the CWA means that a young child must now grow up to adolescence without his mother's care, and two grandfathers may spend most if not all of their remaining twilight years in prison, without the company of family and friends.

CONCLUSION

For all these reasons, the Court should grant the petition and hear this case in tandem with *United States* v. *Lucas*, No. 07-1512. Alternatively, the

Court should hold this petition pending a decision on the merits in *Lucas*.

Respectfully submitted,

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SEPTEMBER 2008

APPENDIX

APPENDIX A

No. 07-1512

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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INTRODUCTION

The Government acknowledges that the issue of "the standard or standards to be used in determining" the coverage of the Clean Water Act (CWA) "under the fractured decision in *Rapanos*"—the fundamental question presented in this case—is the subject of "an acknowledged circuit conflict" and otherwise "a matter of exceptional importance." No. 08-223, *United States* v. *McWane, Inc.* (filed August 21, 2008), at 14-15 & 30n.7; *accord* Opp. 14. The Government also does not dispute that *this* case offers the Court a fair opportunity to resolve that issue and bring needed clarification to the scope of federal jurisdiction under the CWA. The Government, however, argues that *McWane* is "a *more suitable* vehicle" solely because the Fifth Circuit in this case held the evidence sufficient to satisfy the legal standards articulated by both the *Rapanos* plurality and the concurrence, whereas the Eleventh Circuit in *McWane* stated that there the difference between the plurality and concurrence in *Rapanos* "*may* be outcome-determinative." *Id.* at 31 n. 7 (emphases added).

This Court, of course, need not choose between these two "suitable vehicles": It can simply grant both petitions, as it did in *Rapanos*. In so doing, the Court can ensure that *one* of the cases before it (this one) arises in the context of wetlands regulation, which—as *Rapanos*, *SWANCC*, and *Riverside Bayview Homes* confirm—is both more recurring and of greater concern from a constitutional and policy standpoint than the regulation of direct discharges into flowing "open water." By granting both petitions, moreover, the Court can ensure that *one* of the Government's opponents—petitioners here—will vig

orously urge adoption of the *Rapanos* plurality. But even if the Court felt compelled to choose between the two cases, this case, not *McWane*, would provide a more suitable vehicle to resolve the question presented in both petitions, while at the same time allowing the Court to decide two additional questions that are likewise of exceptional importance to property owners nationwide.

ARGUMENT

If the Court is going to expend the resources to determine which of the *Rapanos* opinions provides the controlling standard—as it well should—the Court will undoubtedly want to provide additional guidance on the proper *application* of whichever standard the Court chooses. Such additional guidance may even prove helpful (and perhaps crucial) to the Court's ability to reach a majority position. Yet in these respects, *McWane* is less "suitable" than this case.

1. First and foremost, *McWane* involved discharges into an open, flowing body of water—Avondale Creek—rather than, as here, a normally dry "wetland" that the EPA nevertheless considers a "water of the United States." Accordingly, any additional guidance provided in *McWane* about the meaning of the chosen legal standard is less likely to help lower courts determine the scope of federal jurisdiction over wetlands—the very context in which the constitutional and federalism concerns about the CWA are most acute. See, *e.g.*, *Rapanos*, 547 U.S. at 721-22 (Scalia, J., plurality opinion); *id.* at 776 (Kennedy, J., concurrence); *SWANCC*, 531 U.S. at 174 (noting "significant constitutional questions" in the regulation of wetlands).

Federal jurisdiction over wetlands, moreover, implicates far more property, and property owners, than federal jurisdiction over flowing streams. Indeed, the nation has an estimated 100 million acres of wetlands, and approximately 75% of the wetlands in the lower 48 states are on private property. Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* 6, 10 (Jan. 3. 2007). As a result, unlike flowing streams, there are an enormous number of disputes, in a variety of contexts, involving the federal government's jurisdiction over wetlands. *Id.*; see also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

2. Ironically, the only fact that the Government cites in arguing that this case is less "suitable" for resolving the scope of federal CWA jurisdiction—the fact that the Fifth Circuit purported to apply both the *Rapanos* plurality and the concurrence without deciding which standard controls—is one of the very things that makes this case a superior vehicle.[1] Although the Eleventh Circuit in *McWane* did opine on the meaning of the *Rapanos* plurality (and in a way that conflicts with the Fifth Circuit's decision in this case, see, *infra*, at 8-9), it did not opine on the meaning of the concurrence's "substantial nexus" standard. Indeed, the jury instruction in *McWane* did not attempt

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[1] Nor is there anything unusual in this Court's granting certiorari to resolve one vexing issue in circumstances that require the Court to also resolve another issue. See, *e.g.*, *Quanta* v. *LG Electronics*, 128 S. Ct. 2109 (2008); *Virginia* v. *Black*, 538 U.S. 343, 363, 367 (2003).

to articulate the "substantial nexus" standard, and the Government's witnesses did not attempt to establish such a nexus. Thus, the Eleventh Circuit simply had no occasion to apply that standard to the facts there.[2]

Here, by contrast, the court of appeals purported to apply both the *Rapanos* plurality's standard and the "substantial nexus" requirement. See Pet. App. 11a-12a. For that reason, this case gives the Court a clearer opportunity, once it has selected the governing standard, to provide needed guidance on the meaning and proper application of that standard.

3. The Government is also incorrect in contending (at 18) that, aside from the first question presented, this petition raises only "factbound challenges" that "implicate no issue of continuing importance." In fact, unlike *McWane,* this case not only gives this Court an opportunity to address the critical issue of whether residential homeowners and developers must obtain *federal* permits to install and operate or

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[2] It is, of course, entirely *possible* that the Court could provide additional guidance as to the proper application of the "substantial nexus" standard if it granted the *McWane* petition and ultimately adopted that standard. And it is likely that the Court would provide additional guidance if it decided in *McWane* to adopt the standard of the *Rapanos* plurality. Accordingly, if the Court were to grant review in *McWane*, it should, at a minimum, hold this case pending decision in *McWane*.

On the other hand, if the Court elects to grant both petitions and consider both cases together, it should not consolidate the cases because the interests of the two sets of defendants are not sufficiently aligned to warrant joint briefing and oral argument. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). The Court should instead simply consider the cases in tandem.

dinary residential septic systems (Pet. Question 3 & 26-33),[3] it also gives the Court an opportunity to address critical *legal* issues in the proper applications of both the *Rapanos* plurality and the concurrence—the subject of the second question presented.

As explained in the petition (at 20-21), the critical *legal* error in the Fifth Circuit's application of the "substantial nexus" standard is its utter failure to require that the connection between the wetland at issue and a traditionally navigable body be "significant" or "substantial"—as the *Rapanos* concurrence expressly requires. *See* 547 U.S. at 780. But the Government simply ignores this problem: It points to nothing in the Fifth Circuit's opinion requiring (or holding) that the alleged, generic effect of these wetlands in "controlling flooding" and "preventing pollution" (Opp. at 16) was "significant" or "substantial." It points to no evidence from which the Fifth Circuit *could* have made such a finding. And it completely ignores the district court's express findings indicating

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[3] The Government attempts to minimize the significance of the Fifth Circuit's holding on this point primarily by arguing that septic systems are point sources only in "rare circumstance[s]" because they "do not generally discharge pollutants directly into 'waters of the United States.'" Opp. 19. But that argument assumes that the sweeping interpretation of "waters of the United States" that the Government advanced in this case, and in *Rapanos*, is wrong. As the *Rapanos* plurality pointed out, under the Government's interpretation (as under the decision below), virtually "the entire land area of the United States" would constitute "waters of the United States" subject to federal jurisdiction. 547 U.S. at 722. And that of course would mean that vast numbers of residential septic systems *do*, in fact, "discharge pollutants directly into 'waters of the United States.'" Opp. 19.

that no such evidence was ever presented.[4] See Pet. 20-21.

Accordingly, if the Court decides to adopt the *Rapanos* concurrence, this case, unlike *McWane*, presents a clear opportunity to address a clean legal question about the proper application of the concurrence in this and all future cases: Does the CWA require the Government to demonstrate a "significant" or "substantial" effect on a downstream traditionally navigable water, and if so, what does that mean in the wetlands context?

Contrary to the Government's bald assertion (at 15), this is obviously a question of "continuing importance." Indeed, it has bedeviled not only the lower courts, but also the very federal agencies that the Government represents here. See Pet 16n.2 (collect

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[4] The Government's assertion (at 5) that, in addition to engaging in discharges in violation of the CWA, petitioners "defrauded hundreds of individuals who purchased house lots ... in reliance on petitioners' false representations that the sites were habitable" is dead wrong. In fact, petitioners' mail fraud convictions were based upon sales of 18 specific home lots (not hundreds), which the Government claimed were wetlands subject to the EPA's jurisdiction, and, largely for that reason, were "uninhabitable." And that is no doubt why the district court repeatedly recognized that *all* of the claims against petitioners, including the mail fraud claims, were premised upon federal jurisdiction under the Clean Water Act. See Pet App. 118a.

The Government, moreover, presented no evidence that any of these lots was "uninhabitable" in fact. To the contrary, as shown in Appendix A, to the extent there was evidence on the habitability of these 18 lots, it showed that they not only *were* habitable, but most were in fact *inhabited* at the time of trial. And those that were vacant at trial had been inhabited for substantial periods and were vacated for reasons unrelated to their habitability. See App. A.

ing cases); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (Torruella, J. dissenting) (criticizing the "significant nexus" test as "opaque"); Congr. Res. Service, *supra*, at Summary ("[T]he outer geographic limit of CWA jurisdiction * * * has challenged regulators, landowners and developers, and policymakers for more than 30 years.").

On the other hand, if the Court adopts the standard embraced by the *Rapanos* plurality, this case presents a clean legal issue about the meaning of that standard as well. As explained in the petition (at 21-25), the critical error in the Fifth Circuit's application of that standard was its assumption that a "continuous" surface connection can be established based on evidence of a connection that, although "continuous" in the spatial sense, is not "continuous" in the temporal sense. That is a flat misinterpretation of the "continuous surface connection" standard, which requires temporal as well as spatial continuity. See 547 U.S. at 742; American Heritage Dictionary of the English Language (4th Ed. 2006) (defining "continuous" as including not just physical continuity, but the quality of being "uninterrupted in time").

Here again, the Government's brief largely ignores this problem. Although the Government claims (at 17n.9) that its evidence established "persistent or perennial flows" between the wetlands and a relatively permanent body of water, the Fifth Circuit never articulated such a requirement, let alone made such a finding. See Pet. App. 11a-12a. And nothing in the Government's description of its own evidence establishes a temporally continuous surface connection between a relatively permanent body of water and these wetlands: The closest the Government

comes is a statement by one of its experts, based upon four visits to the property, that "the *tributaries*" running near the wetlands were "persistent or perennial." Opp. at 17n.9.

Here again, therefore, if the Court decides to adopt the *Rapanos* plurality's standard, this case will provide a clear opportunity to address a clean legal question about the meaning of that standard: Does the CWA require the Government to demonstrate a surface connection between the wetland and a relatively permanent body of water that is "continuous" both spatially and temporally? Or, as the Fifth Circuit assumed, is an intermittent but spatially continuous connection enough?

This too is a question of "continuing importance." *Compare* Opp. 15. Indeed, the same issue arose in *McWane* as a result of the district court's holding that the jury could find that the discharges were made into a "navigable water" even if the body of water into which they were made—Avondale Creek—flowed "only intermittently." *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007). Contrary to the Fifth Circuit's approach here, the Eleventh Circuit opined that this approach was inconsistent with the *Rapanos* plurality's standard—precisely because that standard requires temporal as well as spatial continuity. *Id.* at 1223-1224; see also, *e.g.*, *Simsbury-Avon Preservation Soc., LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 229 (D. Conn. 2007) ("While plaintiffs have offered evidence showing that a surface water connection does *at times* exist, they offer no evidence demonstrating a continuous connection.") (emphasis added).

In short, the Fifth Circuit's opinion eviscerates the "substantial" component of the "substantial nexus" requirement of the *Rapanos* concurrence, and the court's assumption that a "continuous surface connection" does not require *temporal* continuity makes a mockery of the *Rapanos* plurality. It is therefore hardly surprising that the Government wishes to avoid having to defend the Fifth Circuit's analysis, which is squarely challenged in *petitioner's* version of the second question presented. Compare Pet. i with Opp. I.

4. As a vehicle for resolving the issues presented, this case is also superior to *McWane* because it brings into sharper focus the substantial liberty interests and due process concerns implicated by the Government's expansive interpretation of the CWA. Unlike the individual defendants in *McWane,* who were placed on probation, the individual petitioners here received—and are now serving—substantial prison terms, ranging from seven to nine years. Indeed, unless this Court vacates her conviction, one of the petitioners (Robbie Wrigley) will lose forever the opportunity to raise her son during the first seven years of his life—all because of an expansive interpretation of a law that all concede is ambiguous at best.

This case thus differs from *Rapanos,* which, as it came to this Court, involved only civil remedies, not criminal sanctions. The Court thus had no occasion to consider expressly the due process/fair notice issues presented by criminal prosecutions under a highly ambiguous statute, or the resulting requirement under the rule of lenity that, at least in that context, ambiguities be resolved, not in favor of the Government, but "in favor of the defendant." *United*

States v. *Bass*, 404 U.S. 336, 348 (1971); *see also* See *Smith* v. *Wade*, 461 U.S. 30, 41n.8 (1983) ("[I]n criminal law * * * terms [a]re generally more strictly construed than in civil law."); *United States* v. *Lanier*, 520 U.S. 259, 266-67 (1997); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (U.S. 2008).

That is also why, although we believe petitioners would likely be vindicated under a proper application of the *Rapanos* concurrence—which the *McWane* defendants will necessarily endorse—we intend to argue on the merits that the *Rapanos* plurality should govern, at least in criminal cases, under the rule of lenity. See, *e.g.*, *Santos*, 128 S. Ct. at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Certainly the fact that four Justices of this Court concluded that the CWA mandates the "continuous surface connection" requirement means that that interpretation is, at a minimum, a reasonable construction of the statute. See, *e.g.*, *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (applying rule of lenity when the Court could "not unreasonably reach either of the conflicting constructions"). And certainly it is far easier for a landowner to determine in advance whether a wetland on her property has a (temporally and spatially) "continuous surface connection" to a relatively permanent body of water, than to determine whether her wetland bears a "substantial nexus" to a traditionally navigable body of water miles away.

Of course, a decision from this Court that both enforces and clarifies the "substantial nexus" requirement could ameliorate the ambiguity and uncertainty that currently exists under that standard. But at

this point, only the standard of the *Rapanos* plurality is sufficiently concrete and precise to pass muster under the due process principles and canons of construction applicable in the criminal context. And only the petitioners in this case (unlike the respondents in *McWane*) have any meaningful incentive to advocate that standard as controlling.

CONCLUSION

The Government's prosecution of the petitioners—and the Fifth Circuit's decision upholding several novel theories of liability—is unprecedented and, as the Government now admits (at 14), raises issues of "great practical importance." Unlike *McWane*, this case will permit the Court not only to resolve the *Marks* issue on which the courts of appeals are in express conflict, but also to articulate the proper understanding of whichever of the *Rapanos* standards the Court chooses, and to prevent the Government from subjecting virtually all who install or use residential septic systems to potential criminal liability for the resulting discharges.

The petition should be granted, and this case should either be briefed and argued along with *McWane*, or decided on its own.

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APPENDIX

APPENDIX A

HABITABILITY OF LOTS SUBJECT TO MAIL FRAUD CLAIMS

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-12	Karen Reynolds	1999	Yes	429, 434-36, 449
AG-11	Jacqueline Peterson	1999	Yes	579-80, 595-96
KK-5	Nancy Watford	1998	No, but owner lived there until 2002, and no evidence tied the vacancy to habitability issues. Watford reaffirmed her lot debt in bankruptcy.	617-18, 645; 653
E-13	Patrick Brossett, Sr.	1997	Yes	2631-33; 2641
II-3 & II-2	Joseph Grayson	1997	Yes, and owner purchased a second lot.	1088-89; 1163-64; 1178-79
G-2B	Norris Jones	1998	Yes	1357, 1363-66
AA-17	Richard Wenniger	1998	Yes	1508, 1510, 1526, 1546, 1566-67
U-15	Phillip Johnson	1998	Yes	2756-58
U-15	Becky Anderson	2004	Yes	2892
AM-6	Dawn McNiece	2000	Yes	Sent. TR 115
M-6	Ruth Hayes	1997	Yes	1582
V-6	Christa Spence	1997	Yes	1745; 1753
O-1	Gwynn Spiers	1997	Yes. Current resident testified she had no problems with the lot or septic system.	1773-74; 1781-82; 4105-06
NN-9	Dee Micele	1998	Yes	1916; 1922; 1949

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-15	Allen Patterson	1998	Yes	2461; 2487
GG-4	Patricia Griswold	1999	No. Owner lived there until 2004, and no evidence tied the vacancy to habitability. Griswold also reaffirmed her lot debt in bankruptcy.	2502-03; 2549
AF-18	Eleanor Johnson	1999	No. Owner's trailer was repossessed in 2003. No evidence tied the vacancy to habitability.	3729- 3305-06
LL-3	Steve Martin	2000	No. Owner was transferred by the Navy in 2003, and he rented out the property until August 2004. The lot was on sale at the time of trial. No evidence tied the vacancy to habitability issues.	3476; 3487; 4311-4312
YY-1 & YY-2	Henry Johnson	1999	No. Original owner moved in 2003, and renter lived there until owner evicted him before trial for failure to pay rent. No evidence tied the vacancy to habitability.	3729; 3305-06
AG-5	Dawn Sullivan	2000	Yes	3597-98; 617-18
JJ-6	Connie Taylor	2000	Yes	3725-26; 3772-73